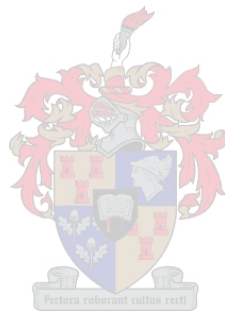


Freedom of assembly and democracy in South Africa

By
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in the Faculty of Law at Stellenbosch University



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DECLARATION

By submitting this thesis/dissertation electronically, I declare that the entirety of the work contained therein is my own, original work, that I am the sole author thereof (save to the extent explicitly otherwise stated), that reproduction and publication thereof by Stellenbosch University will not infringe any third party rights and that I have not previously in its entirety or in part submitted it for obtaining any qualification.

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This thesis is dedicated to my parents, Johrita and Lukas Hanekom. All that I have accomplished in my life is because of their immense love, support and sacrifice.

I dedicate this achievement and triumph to God without whom any of my accomplishments would not be possible. Philippians 4:13.

SUMMARY

In apartheid-era South Africa protests were a mechanism through which the dispossessed and marginalised could challenge their exclusion. These characteristically confrontational and violent protests influenced the framework adopted to regulate demonstrations during the democratic transition and in the new constitutional dispensation, namely the Regulation of Gatherings Act 205 of 1993 ("Gatherings Act"). In the new constitutional dispensation the right to assemble and demonstrate is guaranteed in section 17 of the Constitution.

South Africa has been labelled the "protest capital of the world". Protests are a regular occurrence and are a vital part of democratic participation and dissent. This is because the people, on whose will government is based, need an avenue outside of existing institutions to form and express their views and show their dissent. The question arises as to how certain types of dissent fit within different conceptions of democracy. This thesis attempts to determine whether and to what extent different understandings of democracy allow us to make sense of the nature and importance of protest action.

The thesis examines the regulatory framework of the Gatherings Act, with reference to its implementation by the executive and state administration. It also examines case law in which section 17 of the Constitution has been interpreted. It argues that some of the provisions of the Gatherings Act, the implementation of the Act by the executive, and some court judgments reveal an impoverished understanding of democracy and unduly limit the rights of the citizenry to participate and dissent.

The thesis examines various conceptions of democracy. It argues that, while the institutional models of representative, participatory and deliberative democracy may help to illuminate certain aspects of freedom of assembly, they do not adequately address the inherent tensions in democracy which are illustrated in contentious and disruptive protests. Representative models of democracy tend to offer a restrictive view which assumes that the will of the people is identical to the decisions of representatives, and minimises the role of participation beyond and between elections. Participatory and deliberative models of democracy attempt to eliminate tensions and conflict by creating a platform for a possible rational consensus. These models place a great deal of reliance on the power of representatives to establish spaces for democratic interaction.

Disruptive protests are extra-institutional forms of democratic participation. This type of extra-institutional politics can be linked to the model of agonistic pluralism. Rather than attempting to eliminate and exclude conflict from democratic thought, it recognises that these conflicts are fundamental to democracy. The thesis argues that this model could help enable an understanding of protest action which recognises the centrality of protests to democracy and transformation under the South African Constitution.

OPSOMMING

Tydens die apartheids-era in Suid-Afrika was protesaksie 'n meganisme waardeur diegene wat deur apartheid benadeel en gemarginaliseer is, hul uitsluiting kon uitdaag. Hierdie konfronterende en gewelddadige proteste het 'n invloed gehad op die raamwerk wat aanvaar is om betogings tydens die demokratiese oorgang en in die nuwe grondwetlike bedeling te reguleer, naamlik die Wet op die Regulering van Byeenkomste 205 van 1993 ("Byeenkomstewet"). In die nuwe grondwetlike bedeling word die reg om te vergader en te betoog in artikel 17 van die Grondwet gewaarborg.

Suid-Afrika word gebrandmerk as die "protes hoofstad van die wêreld". Protes is 'n gereelde verskynsel en is 'n noodsaaklike deel van demokratiese deelname en meningsverskil. Dit is omdat die burgers, op wie se wil die regering gebaseer is, 'n meganisme buite die bestaande instellings benodig om hul standpunte te lug en om uitdrukking te gee aan hul meningsverskille. Die vraag ontstaan hoe sekere tipes protes binne verskillende opvattinge van demokrasie inpas. Hierdie tesis poog om te bepaal of, en in watter mate verskillende begrippe van demokrasie ons toelaat om sin te maak van die aard en belangrikheid van protesaksie.

Die tesis ondersoek die regulerende raamwerk van die Byeenkomstewet, met verwysing na die implementering van die Wet deur die uitvoerende gesag en staatsadministrasie. Dit ondersoek ook regspraak waarin artikel 17 van die Grondwet uitgelê word. Die tesis voer aan dat sommige van die bepalings van die Byeenkomstewet, die implementering van die Wet deur die uitvoerende gesag, en sommige van die hofuitsprake op 'n verarmde opvatting van demokrasie berus en die regte van burgers om deel te neem en te verskil, te veel beperk.

Die tesis ondersoek verskillende opvattinge van demokrasie. Dit argumenteer dat, alhoewel die institusionele modelle van verteenwoordigende, deelnemende en oorlegplegende (deliberatiewe) demokrasie kan help om sekere aspekte van vryheid van vergadering te belig, dit nie die inherente spanning van demokrasie, wat deur ontwrigtende en omstrede proteste geïllustreer word, voldoende aanspreek nie. Verteenwoordigende modelle van demokrasie bied 'n beperkende siening wat aanvaar dat die wil van die mense identies is aan die besluite van die verteenwoordigers, en wat die rol van deelname na en tussen verkiesings verminder. Deelnemende en deliberatiewe modelle van demokrasie poog om spanning en konflik uit te skakel deur 'n platform te skep vir 'n moontlike rasionele konsensus. Hierdie

modelle maak grootliks staat op die mag van verteenwoordigers om hierdie ruimtes te vestig.

Ontwrigtende proteste is buite-institusionele vorme van demokratiese deelname. Hierdie tipe buite-institusionele politiek kan gekoppel word aan die model van agonistiese pluralisme. In plaas daarvan om konflik uit demokratiese denke uit te skakel, erken dit dat hierdie konflikte fundamenteel is vir demokrasie. Die tesis voer aan dat hierdie model 'n begrip van protesaksie kan daarstel, wat beklemtoon dat protes sentraal staan tot demokrasie en transformasie ingevolge die Suid-Afrikaanse Grondwet.

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Chapter 1

1 Introduction

1.1 Research problem and background to the research

The right to assemble, demonstrate, petition and picket is guaranteed in section 17 of the Constitution.¹ It is commonly accepted that this right, together with related rights like freedom of expression and freedom of association, is fundamental to democracy.² This is because the people, on whose will government is based, need an avenue outside of existing institutions and electoral processes to form and express their views, show their solidarity and register their dissent. In turn, the interpretation of this right is closely bound up with understandings of democracy. Section 17, like all other provisions in the Bill of Rights, must be interpreted in view of the values that underlie an open and democratic society based on human dignity, equality and freedom.³ The interpretation given to freedom of assembly and the importance attached to it therefore depend to a significant extent on how we understand the open and democratic society envisaged by the Constitution.

Of course, democracy is a contested concept which is given a variety of very different interpretations in constitutional and political thought. Some of these disagreements about the meaning of democracy are brought to the fore by disputes about the meaning and importance of freedom of assembly in a democratic society. Because freedom of assembly involves forms of democratic action which take place outside existing democratic institutions, it raises difficult questions about the relationship between the people and their democratic representatives, and between institutional and extra-institutional politics. For example, certain understandings of democracy assume that, in a democracy that is based on regular elections, universal adult suffrage and multiparty representation, there is less need for protest action as a form of extra-institutional participation.⁴ That is not to say that, on this view, protest

¹ The Constitution of the Republic of South Africa, 1996 (hereafter “the Constitution”).

² *South African National Defence Union v Minister of Defence* 1999 4 SA 469 (CC) paras 7-8. The court highlighted the importance of freedom of expression but also included freedom of assembly and other expressive related rights within this explanation.

³ S 39(1) of the Constitution.

⁴ J Brown *South Africa's Insurgent Citizens* (2015) 36-46. Brown elaborates on this assumption by challenging the myth of democratic transition and the optimism within the representative institutional system during the early years of the post-apartheid dispensation. See also J Duncan *Protest Nation: the right to protest in South Africa* (2016) 1.

action must be banned. However, it is seen as the exception rather than the norm, and it is stressed that such action must take place strictly within the constraints imposed by law. By contrast, other understandings of democracy take a far more positive view of freedom of assembly, and highlight its capacity to hold representatives to account, give a voice to the powerless, expose distortions in the representative system, or serve as a form of direct democracy.

These are not simply academic debates, at least not in a country like South Africa which is characterised by huge inequality and a very high number of protests. Many of those who participate in protest action arguably view it as a vital democratic right which, in the words of Mogoeng CJ, “will, in many cases, be the only mechanism available to them to express their legitimate concerns”.⁵ On the other hand, the State often takes a much more restrictive view of the importance of the right to dissent within a democracy. This is evident from the ways in which some local authorities have exercised their discretion in terms of the Regulation of Gatherings Act, and the manner in which protest action is handled by the police and private security.⁶ These actors have attempted to deter protest action based on a generalised “threat” of unrest, violence or damage. In some cases, the police have suppressed gatherings because they had the *potential* to be non-peaceful and sought to criminalise protest action.⁷ As will be shown in chapter three, State actors tend to adopt a narrow understanding of freedom of assembly and the weight that should be given to it in a constitutional democracy.

Against these restrictive views, this thesis argues for a more robust understanding of the role of freedom of assembly in South Africa’s democracy. Protest action not only

⁵ *South African Transport and Allied Workers Union v Garvas* 2013 1 SA 83 (CC) para 61 (hereafter *SATAWU*). On a purely technical note, there is an inconsistency in the spelling of “Garvas” as it differs in the different reported judgments of the High Court, Supreme Court of Appeal and the Constitutional Court. While the reported judgments of the Constitutional Court and Supreme Court of Appeal refer to “Garvas”, the High Court judgment refers to “Garvis”. This thesis will follow and cite in the manner in which these judgments are reported irrespective of these inconsistencies.

⁶ See chapter 3.

⁷ See chapter 3. For extensive reports on the criminalisation of protest and the violent repression by police, see D McKinley & A Veriava *Arresting dissent: State repression and post-Apartheid social movements* (2005) and M Memeza *A critical review of the implementation of the Regulation of Gatherings Act 205 of 1993 – A local government and civil sociality perspective* (2006).

played an important role in bringing about the end of apartheid,⁸ but continues to provide ordinary people with opportunities to challenge laws and policies and to agitate for change. It provides spaces of antagonism, conflict and disagreement that are vital, in the words of Klare, to “transforming [South Africa’s] political and social institutions and power relationships in a democratic, participatory, and egalitarian direction”.⁹ As highlighted by Liebenberg:

"Active debate and contestation concerning the nature of social change, and the political and legal reforms necessary for achieving it, should not be viewed as antithetical to transformation, but rather as *integral* to its achievement."¹⁰

Against this background, this thesis examines the extent to which different conceptions of democracy allow us to come to terms with freedom of assembly’s importance as a fundamental right, and to interpret it in a transformative manner. The Constitutional Court has described South Africa’s democracy as one which is representative at its *core* and has participatory elements.¹¹ The African Charter on Democracy, Election and Governance, which is binding on South Africa, similarly emphasises a system of government which is representative¹² and contains participatory elements.¹³ In academic literature, mention is also made of a third form of democracy, in addition to representative and participatory democracy, namely direct democracy.¹⁴ In addition to participatory democracy, the South African Constitution is also said to support a form of deliberative democracy.¹⁵ Against this background, this

⁸ See chapter 2.

⁹ K Klare “Legal Culture and Transformative Constitutionalism” (1998) 14 *SAJHR* 146 150.

¹⁰ S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 29 (emphasis added).

¹¹ *Doctors for life International v Speaker of the National Assembly & Others* 2006 6 SA 416 (CC) paras 111,115 and 116 (hereafter “*Doctors for life*”); *Matatiele Municipality & Others v President of the Republic of South Africa & Others (No 2)* 2007 6 SA 477 (CC) para 57 (hereafter *Matatiele 2*).

¹² Article 2(3) and 3(3) of the African Charter on Democracy, Elections and Governance, 30 January 2007.

¹³ Article 3(7) of the African Charter on Democracy, Elections and Governance (2007).

¹⁴ S Woolman & J Swanepoel “Constitutional History” in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (OS 2008) 2-1-2-5. See further I Currie & J de Waal *The Bill of Rights Handbook* 6 ed (2013) 88-89.

¹⁵ *Democratic Alliance & another v Masondo NO & another* 2003 2 SA 413 (CC) para 42. See generally M Freeman “Deliberative Democracy: A Sympathetic Comment” (2000) 29 *Philosophy and Public Affairs* 371–418.

study will focus primarily on these four forms of democracy, namely representative, participatory, deliberative and direct democracy.¹⁶ In order to understand where freedom of assembly fits within these models it is necessary first to provide a basic framework of these institutional models of democracy as expounded in political thought and South African jurisprudence. Furthermore, this thesis seeks to critically highlight the shortcomings of these models in explaining and providing for a more robust and antagonistic form of protest.

In the South African context, protests are typically characterised as disruptive and sometimes destabilising. These institutionalised models as mentioned above may not adequately address the inherent tensions in democracy which are illustrated by these more contentious and disruptive forms of protest. These protests can be described as extra-institutional forms of democratic participation. This type of extra-institutional politics can be linked to the model of agonistic pluralism as advocated by Chantal Mouffe.¹⁷ This thesis seeks to investigate this model of democracy and determine how this model may assist in understanding more contentious forms of protest. This is because agonistic pluralism does not attempt to eliminate or minimise conflict or dissent, but recognises it as inherent in democratic politics.¹⁸

1 2 Research aims

The research aims of this thesis are:

- To place freedom of assembly and protest action in South Africa within a historical and societal context.
- To discuss the ambit and limits of freedom of assembly with reference to the constitutional and legislative framework.
- To examine the meaning of representative and participatory democracy, with reference to the Constitution, case law and academic literature, and to examine whether the Constitution makes provision for direct democracy.
- To examine the relationship between freedom of assembly and different forms of democracy. This will include an analysis of whether and to what extent freedom of

¹⁶ This is not to suggest that these are the only forms of democracy. For a helpful analysis of a variety of models or forms of democracy, see generally D Held *Models of democracy* 3rd ed (2006).

¹⁷ C Mouffe *The Democratic Paradox* (2005) 98-107.

¹⁸ Mouffe *The Democratic Paradox* 100.

assembly must be seen to i) support representative democracy, deliberative and participatory democracy, or ii) institute a form of dissent and protest which challenges these institutional forms of democracy.

- To examine whether and to what extent ideas of agonistic pluralism and disruptive democracy can provide the basis for a nuanced understanding of protest action.

1.3 Methodology

The thesis comprises three dimensions: first, an analysis of the right to freedom of assembly; second, a consideration of the meaning of democracy under the Constitution; and third, an examination of the relationship between freedom of assembly and democracy.

The study of freedom of assembly will rely on the following methods: Firstly, it will provide a historical contextualisation of freedom of assembly within South Africa through the use of secondary sources such as research projects, government reports¹⁹ and historical studies. Secondly, it will analyse the scope and content of freedom of assembly, as well as the permissibility of limitations of this right, with reference to the Constitution, the Regulation of Gatherings Act²⁰ and relevant case law. In addition to these primary sources, secondary sources such as books and journal articles will also be used to help provide a critical analysis of legislation and case law. The legal and policy framework relating to the powers of government (the executive) with regards to protest action will also be evaluated in order to determine the limits of the right and supposed limits of executive power.

The study of the constitutional value of democracy will draw on the following methods and sources: Firstly, a brief description will be given of different meanings and models of democracy. This part of the study will rely mainly on secondary and tertiary sources from political sciences and sociology. Secondly, democracy will be examined from a legal and constitutional perspective. The manner in which the courts have expounded the meaning of democracy in case law will be analysed. In addition, various legal academic contributions will be drawn upon.

¹⁹ Such as the Commission of Inquiry Regarding the Prevention of Public Violence and Intimidation (*The Goldstone Commission*). The Goldstone Commission was appointed to investigate the political violence between 1991 and 1994.

²⁰ The Regulation of Gatherings Act 205 of 1993.

The study of the relationship between freedom of assembly and democracy will draw on political-theoretical texts, case law, commentaries by constitutional law academics and comparative constitutional law. It will be asked whether and to what extent different models of democracy – such as representative, participatory, deliberative and direct democracy, as well as agonistic pluralism – can provide an explanatory framework for understanding freedom of assembly. Reference will occasionally be made to foreign law. For instance, the link made in German law between associative rights (such as freedom of assembly) and direct democracy will be considered.²¹

1 4 Outline of chapters

1 4 1 Chapter 2: Social context and history

This chapter will attempt to contextualise the right to freedom of assembly by providing a historical overview of the development of the legal framework which regulates freedom of assembly, and by examining historical trends relating to protest action in South Africa. It will also examine claims about the disaffection on the part of “the people” with the politics of the ballot (also referred to as “the crisis of representative democracy”) and the increase of social protests.

1 4 2 Chapter 3: Freedom of assembly: the constitutional and legislative framework

This chapter will examine the nature and scope of the right, in view of the values underlying it and other supporting provisions in the Bill of Rights. It will also examine and evaluate limitations of this right in terms of the Regulation of Gatherings Act. Finally, it will analyse and critique South African case law on freedom of assembly, particularly the *SATAWU* case. The chapter will also briefly analyse the recent High Court case of *S v Mlungwana*.²²

²¹ O Salat *The Right to Freedom of Assembly: A Comparative Study* (2015) 48. See further U Preuß “Associative Rights (The Right to the Freedoms of Petition, Assembly, and Association)” in M Rosenfeld & A Sajo (eds) *The Oxford Handbook of Comparative Constitutional Law* (2012) 948 951-952.

²² 2018 1 SACR 538 (WCC).

1 4 3 Chapter 4: Freedom of assembly: direct and representative democracy

This chapter will draw on democratic political theory to provide a basic overview of two different understandings of democracy that often inform the interpretation of freedom of assembly. These are representative and direct democracy. The chapter will specifically discuss the *link* between freedom of assembly and these forms of democracy, with reference to academic literature. It will also evaluate the assumption that freedom of assembly is a form of direct democracy.

1 4 4 Chapter 5: Freedom of assembly: Participatory, deliberative and agonistic democracy

This chapter will examine possible links between freedom of assembly and participatory and deliberative conceptions of democracy. It will ask whether freedom of assembly can be seen as supportive of representative and deliberative institutions or as a vehicle for challenging these institutionalised forms of democracy. The chapter will also consider an alternative model for understanding democracy which may allow for the type of dissent expressed through demonstrations and assemblies. It will ask whether and how agonistic pluralism may allow for a form of extra-institutional politics that supports democratic values. This chapter will focus on how a vision of democracy as disruptive and agonistic could facilitate a more adequate understanding of the democratic possibilities inherent in the “politics of the street” and the “rebellion of the poor”.

1 4 5 Chapter 6: Conclusion

The closing chapter will summarise the research presented in the previous chapters and seek to draw the different strands of the argument together.

Chapter 2

2 Social context and history

2 1 Introduction

In order to understand the nature and importance of freedom of assembly, it is essential to examine this right in a historical and social context. The chapter commences with a historical analysis of protest action in South Africa. It discusses protest action during apartheid and in the anti-apartheid struggle. This provides a useful point of departure for understanding the importance of protest action in situations where people do not have the vote, and for gaining a sense of how the dissent culture inherited from the past influences current trends and spaces of contestation in South Africa. The chapter then examines how the characteristically confrontational and violent protests of the apartheid era influenced the framework that was adopted to regulate demonstrations during the democratic transition and in the new constitutional dispensation.

The end of apartheid brought political participation through the vote, which raised the expectation that there would be a drastic decrease in protest action. However, twenty years into democracy, South Africa is still characterised by a very high incidence of protests. The chapter asks whether the intensity and frequency of protests are evidence of a disaffection on the part of “the people” with institutionalised politics. It also aims to contextualise protest action in the new constitutional dispensation through an analysis of the substantial increase in protest action at local and national levels. General trends are identified, and the Marikana protests are looked at specifically. The chapter also briefly discusses the increase in the use of protests by political parties and social movements against the background of understandings of South Africa as a dominant party democracy.

2 2 South Africa: the protest capital of the world

During South Africa’s apartheid and colonial past, protests had been used as a tool to challenge an unjust system and provide a “voice to the voiceless”.¹ With the advent of constitutional democracy, this type of dissent would *seem* to be less necessary in

¹ *South African Transport and Allied Workers Union v Garvas* 2013 1 SA 83 (CC) paras 61 and 62 (hereafter *SATAWU*).

view of the universality of the vote² and institutionalised forms of public participation for the citizenry.³ In the view of many, the advent of constitutional democracy should have resulted in a shift from popular mobilisation and protests to a politics that is centred on representative institutions.⁴

The assumption that the shift from apartheid to a constitutional democracy, where all citizens have the right to vote, would result in a decrease in protest action has been proven wrong. In fact, the last decade has witnessed a substantial increase in public protest action.⁵ This has led to South Africa being labelled as the “protest capital of the world”.⁶ The reasons for this increase in protest action are numerous, and include a lack of faith in the current system to provide a wide range of services for citizens and to aptly provide for true meaningful participation in decision making.⁷ Even though the end of apartheid has brought with it large scale positive changes through a democratic government for the people, South Africa remains a vastly unequal society. The increase of protests in the current South African context indicates that, although provision has been made for various spaces for citizen participation, people still see protests as an important vehicle for political expression and participation.

² S 19 of the Constitution.

³ H Botha “Fundamental rights and democratic contestation: reflections on freedom of assembly in an unequal society” (2017) 21 *Law, Democracy and Development* 221 222.

⁴ 3-4.

⁵ C Mbazira “Service delivery protests, struggle for rights and the failure of local democracy in South Africa and Uganda: Parallels and divergences” (2013) 29 *SAJHR* 251 266. See further an analysis of the statistics indicating the increase in protest action in M Marks & D Bruce “Groundhog Day? Public order policing twenty years into democracy” (2014) 27 *SACJ* 347-376. In addition see P Alexander “Protests and Police Statistics: Some Commentary” *South African Research Chair in Social Change, University of Johannesburg, Johannesburg* (2012) and R Berkhout & J Handmaker “Introduction to Mobilising Social Justice: critical discussion on the potential for civic action and structural change” in J Handmaker & R Berkhout (eds) *Mobilising Social Justice in South Africa: Perspectives from Researchers and Practitioners* (2010) 1 3. See further MC Dawson “Resistance and Repression: policing protest in post-apartheid South Africa” in J Handmaker & R Berkhout (eds) *Mobilising Social Justice in South Africa: Perspectives from Researchers and Practitioners* (2010) 106 111 and P Alexander “Rebellion of the poor: South Africa’s service delivery protests-a preliminary analysis” (2010) 37 *Review of African Political Economy* 25 27.

⁶ P Alexander “A massive rebellion of the poor” (13-04-2012) *The Mail and Guardian* <https://mg.co.za/article/2012-04-13-a-massive-rebellion-of-the-poor> (accessed 04-05-2017);

⁷ Dawson “Resistance and Repression” in *Mobilising Social Justice in South Africa* 128; Mbazira (2013) *SAJHR* 265.

Freedom of assembly and demonstration is seen as a hallmark of democracy. The use of protest action can play a positive role in promoting an active citizenry and a participatory form of government. However, the label of “the protest capital of the world” is generally not seen as something positive. This label has been linked to the idea of the “rebellion of the poor”.⁸ Many protests have highlighted failures in local government. These protests are not only indicative of inefficiencies in the provision of socio-economic services, but also indicate possible failures in the functioning of the institutions which embody forms of participatory and representative democracy.⁹

2 3 The history of assembly and demonstration in South Africa

2 3 1 *Apartheid*

In 1948, the National Party Government came into power and adopted its policy of apartheid.¹⁰ Apartheid – as an institutionalised policy for racial separation – created a country where a large part of the disenfranchised black population¹¹ was excluded from the political process.¹² Apartheid South Africa was described by Dugard as a “pigmentocracy in which all political power is vested in a white oligarchy, which in turn is controlled by an Afrikaner elite”.¹³ But political exclusion was not the only violation of basic human rights. The civil rights of black people were also systematically infringed, and they had very limited opportunities in the socio-economic sphere. The apartheid government used its vast political power to consolidate economic and social

⁸ Alexander (2010) *Review of African Political Economy* 27.

⁹ For a full analysis of representative democracy see chapter 4 and for a full analysis of participatory democracy see chapter 5.

¹⁰ The best translation for Apartheid would be “separate-ness” and it refers to a policy of racial separation.

¹¹ The term “black” refers to all peoples of South Africa other than those who are categorised as the “white” group.

¹² Parliament did establish a representative body for certain portions of the black population. The Tricameral Parliament established in terms of the Tricameral Constitution of 1983 created three houses of Parliament: The House of Delegates (for Indians), the House of Representatives (for Coloureds) and the House of Assembly (for Whites). This parliament was largely inadequate and a charade. The political power remained vested in the House of Assembly. For more on the Tricameral Parliament see J Dugard “Racism and Repression in South Africa: The Two Faces of Apartheid” (1989) 2 *Harvard Human Rights Law Journal* 97-98

¹³ J Dugard *Human Rights and the South African Legal Order* (1978) 7.

power within a white elite.¹⁴ There was therefore a close link between the exclusion of the black population from the political process and socio-economic discrimination against them.

The exclusion of the majority of the population from the right to vote greatly enhanced the importance of protest action as a means for black people to make their voices heard. In Western democratic thought, “ultimately, the basic means of protest... is the ballot box”,¹⁵ which means that dissent is institutionalised through the democratic right to vote. However, since this type of protest was not available to black South Africans, who did not have the right to vote, protest action outside of state institutions was the only participatory opportunity for them to dissent. Interestingly, the apartheid government declared in 1968:

“It is no offence in South Africa to *oppose* the policy of separate development. It is opposed by the opposition party in the South African Parliament itself. Daily, a large section of the South African Press vigorously criticises the policy, as well as their Government actions... No action can be taken under the South African Government as long as their opposition is conducted in a *constitutional manner*.”¹⁶ (emphasis added.)

This statement, which seemed to proclaim the right of the citizens to dissent, was illusory. Firstly, black South Africans were not involved in the political process and therefore would not be able to dissent in those institutional spaces. Institutionalised dissent was only possible for groups who were white. Additionally, these groups expressed dissent in a manner which would not disturb the status quo created through apartheid.¹⁷ Secondly, those who opposed the system of apartheid and aimed to disturb the status quo – by asserting black citizenship and arguing for the inclusion of the black population in the political process – were limited to forms of opposition that could be labelled “constitutional”. Therefore, the right to dissent was protected if the content and type of dissent did not threaten the apartheid state. Under a system of parliamentary sovereignty, the State could determine the bounds within which protest was permissible. The legislative limits on protest action were so severe that the freedom to protest and dissent could be said to have been an illusion.

¹⁴ D McKinley & A Veriava *Arresting dissent: State repression and post-apartheid social movements* (2005) 15-19.

¹⁵ A Fortas *Concerning dissent and civil disobedience* (1969) 19.

¹⁶ Department of Foreign Affairs, Republic of South Africa *South Africa and the rule of law* (1968).

¹⁷ Dugard *Human Rights* 149.

The extra-institutional nature of protest action during the apartheid era was necessary because there was no space for political participation through the ballot box. Protest was a vital part of a democratic culture in order to *create* a democracy. It was seen as a mechanism for the people to have their voices heard. However, the insistence that protests had to occur in a “constitutional manner”, and the severe restrictions placed on extra-institutional political activities in terms of legislation, made dissent extremely difficult for the anti-apartheid struggle.

2 3 2 *The apartheid regulatory framework*

The apartheid government was committed to stifling dissent through the enactment of repressive laws. These laws severely restricted freedom of expression, association, assembly and demonstration, in order to silence opposition to apartheid. This section will not provide an exhaustive discussion of the repressive regulatory framework but will rather provide a brief overview of some of the most important legislation, in order to highlight the suppressive nature of the restrictions on protest action.

A central feature of this regulatory framework was that demonstrations on public property mostly required *permission* from the local authority.¹⁸ Demonstrations and gatherings were viewed as a privilege and not a right. Even when such permission was granted by the local authority, the State introduced a variety of repressive laws which allowed a magistrate and the Minister of Justice to prohibit certain organisations, individuals and groups from gathering or demonstrating.

The series of repressive laws regarding assembly began with the promulgation of the Suppression of Communism Act (“SCA”).¹⁹ The SCA declared the Communist Party to be an unlawful organisation and criminalised all proponents of communism.²⁰ This Act also allowed the Minister of Justice to declare other organisations unlawful.²¹ Section 9 of the SCA allowed the Minister of Justice to prohibit a gathering “whenever in the opinion of the Minister there is reason to believe that the achievement of any of

¹⁸ Dugard *Human Rights* 187. The by-laws of most cities required permission from local authorities for gatherings and demonstration on public property. S 15 of the General Law Further Amendment Act 92 of 1970 required that assemblies receive both the local authority’s consent and the approval of a magistrate in the district in which the assembly was to take place.

¹⁹ Act 44 of 1950.

²⁰ See also Public Safety Act 3 of 1953.

²¹ S 2(2) of the SCA.

the objects of communism would be furthered". Although the Act focussed on communism, the definition of communism²² was broad enough to allow the Minister to restrict and prohibit any *gatherings* of organisations which were not necessarily banned at that stage.²³ The SCA was based on the idea that communism posed a threat to State security.²⁴ The SCA was the first in an extensive sequence of security promulgations which were mostly aimed at quieting dissent and political opposition through the limitation of free speech and assembly.

The Criminal Law Amendment Act ("CLA")²⁵ was promulgated in reaction to the defiance campaign which was launched in 1952. The defiance campaign was organised as a passive resistance movement in order to protest against discriminatory legislation (such as the pass laws). This protest was organised by way of a deliberate violation of minor apartheid laws. Parliament in response enacted the CLA which criminalised this type of political protest.²⁶ The CLA had detrimental effects for political protest. While the violation of minor laws or by-laws may have had the penalty of a minor fine, the CLA provided for a much harsher sentence (imprisonment between 3-5 years) if such violation was an intentional violation in support of a campaign/cause.²⁷

One of the most repressive legislative instruments promulgated under the pretence of "security" was the Public Safety Act ("PSA").²⁸ The PSA provided the State President with the power to declare by proclamation in the Government Gazette that a state of emergency exists within the Republic or within specified areas within the

²² S1(1) of the SCA.

²³ Such as the African National Congress and the Pan African Congress. The Minister of Justice was given broader and similar powers to disband other organisation in terms of the Unlawful Organisations Act 34 of 1960. This Act was primarily introduced to outlaw the African National Congress and the Pan African Congress.

²⁴ MF Ackermann *Die reg insake openbare orde en staatsveiligheid* (1984) 44-48.

²⁵ Act 8 of 1953.

²⁶ Section 1 of the CLA made it an offence to violate any law "by way of protest against a law or in support of any campaign against any law, in support of any campaign for the repeal or modification of any law or the variation or limitation of the application or administration of any law".

²⁷ See further the discussion of the CLA in A Mathews *Law, Order and Liberty in South Africa* (1971) 184-191.

²⁸ Act 3 of 1953.

Republic.²⁹ The State President and the Minister of Justice³⁰ were able to make repressive regulations in terms of the PSA. The PSA was enacted in 1953. Although a state of emergency was not declared in that year, the threat of a state of emergency in terms of the PSA, along with the State's use of the CLA, ensured that the defiance campaign of 1952 effectively ended. However, a state of emergency was declared in reaction to the Sharpeville massacre of 1960.³¹ The State used these powers to enact regulations which placed blanket prohibitions on gatherings and meetings for prolonged periods of time from 1960 onwards.³² During the 1980's the declaration of a state of emergency was a regular occurrence. The Minister of Justice would highlight specific black areas and areas where there were regular anti-apartheid protests and then make regulations which would ban gatherings and meetings.³³

The Riotous Assemblies Act³⁴ dealt specifically with gatherings and assemblies which were of a political nature.³⁵ Section 2(1) of this Act provided a magistrate with the power to prohibit public gatherings in public spaces or the attendance thereof when he or she had "reason to apprehend that the public peace would be seriously endangered by the assembly". Additionally, section 3 of the Act provided the Minister of Justice with the power to prohibit a gathering where the Minister had reason to

²⁹ S 2(1) of the Public Safety Act. This section provided the State President with discretionary powers where he determined that in *his opinion* there was a serious threat to the safety of the public and the maintenance of public order and the ordinary law of the land was inadequate to enable the Government to control the situation.

³⁰ S 4 of the Public Safety Act.

³¹ See discussion below under part 2 2 4.

³² The apartheid state used the regulations to ban groups and protest actions for months at a time during periods of popular resistance to the apartheid government. See Dugard *Human Rights* 110-111. See also Mathews *Law, Order and Liberty* 221-225.

³³ Dugard *Human Rights* 110-111. See also Mathews *Law, Order and Liberty* 221-225 and C Bundy "Street Sociology and Pavement Politics: Aspects of Youth and Student Resistance in Cape Town" (1987) 13 *Journal of Southern African Studies* 303 330. See also J Stemmet "'In case of emergency'. South African states of emergency, CA. 1985-1988" (2015) 40 *JCH* 59-76.

³⁴ Act 17 of 1956.

³⁵ The purpose of the Act was to "consolidate the laws relating to riotous assemblies and the prohibition of the engendering of feelings of hostility between the European and non-European inhabitants of the Union and matters incidental thereto, and the laws relating to certain offences". Prior to this Act there was legislation which specifically limited the meetings and gatherings of "Bantu's/Natives" through the Bantu (Urban Areas) Consolidation Act 25 of 1945. This Act provided wide powers over "the conduct, control, supervision and restriction of meetings or assemblies of Bantu".

believe that the gathering would cause “feelings of hostility” between European and non-European inhabitants. These powers were broad enough for the State to intervene and prohibit many gatherings/meetings. Because apartheid by its very essence instituted racial discrimination, any anti-apartheid struggle or protest would often cause “feelings of hostility” between races. The Riotous Assemblies Act only applied to “public gatherings”, which was defined with reference to a “public place” and to “twelve or more persons”. Prohibitions of gatherings could be avoided by meeting in a private place or if a meeting did not exceed 11 persons at a time. The State responded to this gap through the promulgation of the Gatherings and Demonstrations Act³⁶ and the Riotous Assemblies Amendment Act.³⁷ The Amendment Act removed all references to “public” gatherings. The Amendment Act also gave wide powers to the police with regard to unlawful meetings.³⁸

Undoubtedly, one of the most comprehensive repressive legislative instruments used by the Government was the Internal Security Act (“ISA”),³⁹ which repealed the SCA. Large sections of the original SCA were retained in the ISA. The ISA also repealed various sections of the Riotous Assemblies Act, but those repealed sections were then included in the ISA.⁴⁰ The Minister used the provisions for banning protest action specifically during the 1970’s and 1980’s, when the anti-apartheid struggle used protests as a tool to voice their opposition and to make South Africa ungovernable.⁴¹

³⁶ Act 52 of 1973. This Act prohibited demonstrations and open air gatherings of any number within the precincts of Parliament.

³⁷ Act 30 of 1974.

³⁸ S 7 of the Amendment Act provided the police with extensive powers of dispersing unlawful meetings through the use of force. An order to disperse only needed to be given once in each official language (Afrikaans and English), and an explicit warning prior to the use of force was no longer required. See the discussion in Ackermann *Die reg insake* 159-160.

³⁹ Act 79 of 1976 and Act 74 of 1982.

⁴⁰ S 46(1) of the ISA provided the same power to a Magistrate with regard to prohibiting a gathering on the basis of a disturbance to the “public peace” as contained in s 2(1) of the Riotous Assemblies Act. However, the ISA expanded on “any particular gathering in any public space” by referring to any “particular gathering or any gathering of a particular nature, class or kind at a particular place or in a particular area or wheresoever in his district”.

⁴¹ McKinley & Veriava *Arresting dissent* 5-7.

2 3 3 *The liberation and anti-apartheid struggle*⁴²

The anti-apartheid struggle had to navigate its opposition and defiance in full cognizance of the regulatory framework as discussed above. In many respects the promulgation of these repressive laws was a direct response to the liberation struggle.⁴³ Protests in the form of gatherings, meetings and demonstrations were of vital importance for the liberation struggle. In reaction to the repressive State and the exclusion from the political processes, protests were a hallmark of democratic participation in an undemocratic state.⁴⁴ The unlawful demonstrations and gatherings were an act of defiance in order to participate.

Organisations that were prominent in the anti-apartheid and liberation struggle included the African National Congress (“ANC”), Pan African Congress (“PAC”), South African Communist Party (“SACP”), United Democratic Front (“UDF”) and various other social and revolutionary movements. These liberation movements organised various campaigns and protests. The Sharpeville massacre of 1960 and the Soweto uprising of 1976 were two of the most significant moments in the history of protest politics in South Africa.

The Sharpeville massacre occurred on 21 March 1960. A protest was initially planned as part of a defiance campaign organised by the ANC.⁴⁵ A massive

⁴² It is important to note that although the terms “anti-apartheid struggle” and “liberation struggle” are sometimes used interchangeably, they are not necessarily the same. The anti-apartheid struggle was directed towards the racialized laws of the apartheid government which disenfranchised the majority of black South Africans. These laws sustained deep political, social and economic inequalities. The anti-apartheid struggle was focussed on liberation *from* apartheid. The liberation struggle however encapsulated a larger ideal of freedom. It was not necessarily only directed against the apartheid government, but was framed by its insistence on the political, economic and social freedom of the oppressed. Therefore, the anti-apartheid struggle can be placed under the banner of the liberation struggle, however the liberation struggle is not only focussed on political freedom by means of inclusion in the political process. To equate anti-apartheid with liberation creates a false impression that through the end of apartheid there would be liberation from oppression.

⁴³ See discussion of the “defiance campaign” under part 2 2 3 above.

⁴⁴ The liberation struggle was not only directed against political oppression, but also challenged capitalism. Many of those who formed part of the liberation struggle sought a complete change in economic and labour policy through a possible restructuring of the State. See the discussion in McKinley & Veriava *Arresting dissent* 5-12 and see in general D T McKinley *The ANC and the liberation struggle: a critical political biography* (1997).

⁴⁵ Dugard *Human Rights* 214.

demonstration would take place on 31 March 1960.⁴⁶ The Pan African Congress (“PAC”) however planned an earlier demonstration for 21 March 1960 in order to preempt the ANC.⁴⁷ The demonstration was specifically directed against the pass laws. The participants planned not to carry their passbooks and then to surrender themselves to the police as a collective. They would ask for no bail, and raise no defence at their trials.⁴⁸ An estimated 7000 black people marched to the police station in the early morning on 21 March 1960.⁴⁹ The participants in the march were unarmed.⁵⁰ The police and military response was immediate. They first attempted to use fighter planes to intimidate the crowd to disperse.⁵¹ Subsequently police reinforcements arrived with armoured cars.⁵² As tension increased, a scuffle ensued between a few protestors and police reacted with gun shots.⁵³ The crowd fled, but the police continued to shoot at the fleeing protestors. The shooting had been deliberate. The Sharpeville massacre resulted in 69 dead and 186 wounded.⁵⁴ This act of defiance and the violent reaction by the police was a defining moment in the South African dissent politics of the time. The massacre gave rise to further demonstrations and protests in various places in South Africa.⁵⁵ The State reacted swiftly to this period of unrest through the banning of the ANC and PAC.⁵⁶ Additionally the State declared

⁴⁶ C Nicholson “Nothing Really Gets Better: Reflections on 25 years between Sharpeville and Uitenhage” (1986) 8 *Human Rights Quarterly* 511-512.

⁴⁷ S Woolman & J Swanepoel “Constitutional history” in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (OS 2008) 2-1-2-21.

⁴⁸ Nicholson “Nothing Really Gets Better” *Human Rights Quarterly* 512

⁴⁹ 512.

⁵⁰ *Truth and Reconciliation Commission of South Africa Report* Volume III Chapter 6 (1998) 535 and 537.

⁵¹ Woolman & Swanepoel “Constitutional history” in *CLOSA* 2-21.

⁵² Nicholson “Nothing Really Gets Better” (1986) *Human Rights Quarterly* 512.

⁵³ *Truth and Reconciliation Commission* Volume III Chapter 6 (1998) 535.

⁵⁴ *Truth and Reconciliation Commission* Volume III Chapter 6 (1998) 4.

⁵⁵ *Truth and Reconciliation Commission* Volume III Chapter 6 (1998) 397. For example, when the news of the Sharpeville massacre reached Cape Town, a crowd of 5–10 000 people assembled in Langa on 21 March 1960 in defiance of a country-wide ban on public meetings and gatherings of more than 10 persons. At least three people were killed during this demonstration. There was continued disruption and dissent during 1960-1962. See further Nicholson “Nothing Really Gets Better” *Human Rights Quarterly* 515.

⁵⁶ 515.

a state of emergency in terms of the PSA which allowed the State President and Minister of Justice to prohibit a variety of meetings and gatherings.⁵⁷

The Soweto uprisings of 1976 were sparked by a language policy related to the use of language in black schools. In 1975, the Bantu Education Department issued a directive in the Transvaal that Afrikaans was to be used on an equal basis with English as a medium of instruction in secondary schools.⁵⁸ By January 1976, the State decided to make Afrikaans the primary medium of instruction in black schools in Transvaal.⁵⁹ This policy resulted in discontent among black youth who already were dissatisfied with the Bantu Education system.⁶⁰ Unlike the Sharpeville massacre, these protests and demonstrations were not primarily organised by a political movement or organisation such as the PAC or the ANC, but by a student movement focused on their right to education. Following a series of boycotts, protests and demonstrations during the months leading up to June,⁶¹ a protest was organised for 16 June 1976. On this day approximately 10 000 students were involved in the protest.⁶² The intention of the organisers and leaders of this demonstration was that the participants would remain peaceful.⁶³ However, the intimidation tactics of the police resulted in altercations between protestors and the police. In reaction, smaller groups of students started throwing stones. The reaction of the police to the largely peaceful demonstration and certain minor provocations was to open fire on the students.⁶⁴ Chaos ensued and 11 people were killed⁶⁵ and many injured. Resistance expanded throughout the country and continued for several months. There were 575 official deaths, including 390 in the Transvaal and 137 in the Western Cape.⁶⁶ Over 2 000

⁵⁷ Dugard *Human Rights* 110.

⁵⁸ *Truth and Reconciliation Commission* Volume III Chapter 6 (1998) 557.

⁵⁹ J Brown *The Road to Soweto* (2016) 155.

⁶⁰ *Truth and Reconciliation Commission* Volume III Chapter 6 (1998) 557.

⁶¹ Brown *The Road to Soweto* 155-162. See further *Truth and Reconciliation Commission* Volume III Chapter 6 (1998) 557-558.

⁶² *Truth and Reconciliation Commission* Volume III Chapter 6 (1998) 18.

⁶³ Brown *The Road to Soweto* 163.

⁶⁴ For a full account of events see further *Truth and Reconciliation Commission* Volume III Chapter 6 (1998) 557-570. The Truth and Reconciliation Commission specifically found that “the march of students was peaceful until violent police intervention to stop the march created a situation where unarmed and peaceful students themselves retaliated with violence”.

⁶⁵ Brown *The Road to Soweto* 170.

⁶⁶ *Truth and Reconciliation Commission* Volume III Chapter 6 (1998) 18.

people were injured.⁶⁷ The Soweto uprising of 1976 resulted in an upsurge of popular protest in the country and generated the beginnings of a vocal and determined youth. The eruption of popular protest and demonstration was the trigger for the liberation struggle for a new generation in the 1980's. Although these protests were caused by frustrations relating to education,⁶⁸ they also stemmed from the absence of an institutional platform where those who were affected by the National Party's decision on the language policy could voice their opinions.

Both the Sharpeville massacre and the Soweto uprisings triggered violent responses from the State. The defiant character of these protests became a hallmark of dissent culture in South Africa. Protests became an important political vehicle for resisting the State and creating alternative democratic spaces. Many of the protests during apartheid could be characterised as a challenge to the very legitimacy of the apartheid state and political order. These protests can be viewed as an assertion of the "people's power" in opposition to the State, through insurrectional movements aimed at creating something new.⁶⁹

2 3 4 *The Commission of Inquiry Regarding the Prevention of Public Violence and Intimidation ("The Goldstone Commission")*

When negotiations had already commenced for a democratic transition from apartheid to a new constitutional era, the repressive violence of the state and revolutionary violence of the liberation struggle had almost reached a point where South Africa was ungovernable. President FW de Klerk appointed a Commission led by Judge Richard Goldstone to investigate political violence and intimidation during the transitional period.⁷⁰ One of the main undertakings of this Commission was to appoint a multinational advisory panel in order to determine a new approach to assemblies and demonstrations in South Africa.⁷¹ This panel was fundamental for the

⁶⁷ 18.

⁶⁸ This fight for the right to education can be put under the banner of the larger liberation struggle.

⁶⁹ Botha (2017) *Law, Democracy and Development* 225-226; H Botha "Instituting public freedom or extinguishing constituent power? Reflections on South Africa's Constitution-making experiment" (2010) 26 *SAJHR* 67-72.

⁷⁰ M Memeza "A critical review of the implementation of the Regulation of Gatherings Act" (2006) *Report by Freedom of Expression Institute* 12.

⁷¹ Heymann (ed.) *Towards Peaceful Protest in South Africa* (1993) vii.

establishment of a new regulatory process for demonstrations and provided the basis for a new legislative framework.

The point of departure that the panel took was that the right to freedom of assembly and demonstration is a universally recognised right necessary for democratic participation.⁷² Judge Richard Goldstone stated that “the right to public demonstration is the only peaceful means which disenfranchised South Africans possess in order to make a powerful political statement”.⁷³ The panel used a comparative model in order to inform their report on assembly.⁷⁴ It referred to expertise from various perspectives regarding protest action in different countries in order to inform the manner in which demonstrations should be regulated in South Africa. However, the panel also recognised the specific South African context,⁷⁵ including the fact that protests were historically linked to a rebellion against the state and the discriminatory status quo. There was a distrust and antagonism towards the State, particularly the police.⁷⁶ In addition, the violence that occurred at the time the panel was compiling this regulatory framework influenced the manner in which the panel viewed the idea that freedom of assembly can only be protected if it is non-violent and unarmed. Therefore, there was a commitment to put a framework in place to deter any forms of violence. Emphasis was placed on ensuring that all role players would interact on an equal basis through negotiation.⁷⁷

The panel recognised that three main parties should hold the responsibility to ensure the proper exercise of the right to demonstrate.⁷⁸ These parties are those organising demonstrations, the local/state authorities and the police. This is often referred to as the triumvirate.⁷⁹ The panel placed great emphasis on the consultative

⁷² 1.

⁷³ vii.

⁷⁴ Specifically, the Panel referred to the United States of America, Israel, Belgium, Netherlands, Germany and Northern Ireland. The Panel comprised of members from diverse backgrounds, professions and specialities. See Appendix A of P Heymann (ed.) *Towards Peaceful Protest in South Africa* (1993).

⁷⁵ Heymann (ed.) *Towards Peaceful Protest in South Africa* (1993) 2 and 48.

⁷⁶ 3.

⁷⁷ 14.

⁷⁸ ix.

⁷⁹ Memeza “A critical review” *Freedom of Expression Institute* 12.

process between these parties.⁸⁰ This process was pre-emptive in nature to prevent any type of dissent which could lead to violent altercations between protesters and bystanders. Consultation and negotiation were to ensure that animosity between the police and protesters could be controlled and violence could be prevented. The panel intended to ensure that although the local authorities would have the power to place conditions on organised demonstrations (or prevent demonstrations in extreme cases), this should not be confused with the power of granting permission/authorising. The organisers of protests should always have recourse to the courts through prompt judicial review to reinforce their right to demonstrate.⁸¹

The panel rejected the idea that assembly is a privilege which can only be exercised when permission has been granted by local authorities.⁸² Instead, it favoured a shift towards a “notice only” system.⁸³ It thus emphasised the existence of a right to protest which does not depend on the discretion of the State. This was an important shift, as under the previous system, the State had the power to decide whether people had the right to protest or not. Although the panel recognised the importance of consultation,⁸⁴ its recommendations placed the power with the people (the citizenry).

The panel was aware that its report was drawn up within the context of an undemocratic state where the majority of South Africans did not have the right to vote. It therefore stated that “in making our recommendations we have assumed that they are recommendations for a South Africa that will truly be democratic”.⁸⁵ The panel recognised that the new regulatory framework it proposed was transitory. The panel was established in the context of a fragile State and an uncertain future with regards to the structure of the new democratic state. It therefore was focussed on ensuring that the transition towards the first democratic elections would be stable. The recommendations of the Multinational Panel were then used by the Goldstone Commission to draft the Regulation of Gatherings Act 205 of 1993.

⁸⁰ See Part II of Heymann (ed.) *Towards Peaceful Protest in South Africa* (1993).

⁸¹ 13 and 59.

⁸² 10.

⁸³ 10.

⁸⁴ 10.

⁸⁵ 2.

2 3 5 *The Regulation of Gatherings Act*

The Regulation of Gatherings Act was given Presidential assent on 14 January 1994 and came into operation on 15 November 1996. It was therefore adopted by Parliament and assented to by the President before the first democratic elections of 27 April 1994, and prior to the commencement of the Interim Constitution⁸⁶ and the final Constitution.⁸⁷ The Regulation of Gatherings Act was therefore not constitutionally-compelled legislation.⁸⁸

This raises the question whether the Act gives adequate protection to the right to freedom of assembly in terms of the Constitution. It must also be borne in mind that the intent of the panel and commission, who were instrumental in the promulgation of the Act, was that the Act would be transitory.⁸⁹ The panel recognised that the context of South Africa was changing and that the legislature may have to address problems associated with the Act in the new constitutional framework. But these problems were seen to be less urgent within the context of the introduction of the right to vote and participate in the new democracy. Additionally, the Act was seen as ground-breaking, as it repealed a series of draconian laws which had enabled the Apartheid State to create such a repressive regime.⁹⁰ The Multinational Panel had created a framework which required a significant departure from the past understanding of freedom of assembly. This achievement was so noteworthy that it is understandable that the new democratically elected Parliament did not consider a review or amendment of the Act as necessary.

In the new constitutional democracy, every adult citizen had the right to vote⁹¹ and to participate in political activities.⁹² Protest action, as it had occurred in the past, was perceived as no longer as important as it had been. The anti-apartheid struggle

⁸⁶ Interim Constitution of the Republic of South Africa, Act 200 of 1993.

⁸⁷ Constitution of the Republic of South Africa, 1996 (hereafter the Constitution).

⁸⁸ Memeza "A critical review" *Freedom of Expression Institute* 12. See also Freedom of Expression Institute (FXI) *The right to protest: A handbook for protestors and police* (2007) 5.

⁸⁹ 12.

⁹⁰ The Gatherings and Demonstrations in the Vicinity of Parliament Act 52 of 1973 (as amended in 1992); s 46(1) and (2), 47, 48, 49, 51, 53, 57 and 62 of the Demonstrations in or near Court Building Prohibition Act 71 of 1982; the Gatherings and Demonstrations at or near Union Buildings Act 103 of 1992. The passing of the RGA also saw the repeal of section 46(1) of the Internal Security Act of 1982.

⁹¹ S 19 of the Constitution.

⁹² Botha (2017) *Law, Democracy and Development* 223- 224.

assumed that, once political power was attained through the vote, the socio-economic liberation of the majority black population would follow.⁹³ Thus, now that apartheid was over, protest would not be necessary because the representatives at local and national level would ensure the social and economic liberation of the electorate.

2 4 Constitutional democracy

2 4 1 Section 19 and “the will of the people”

South Africa’s democracy must be understood with reference to the preamble to the Constitution, which begins with the words, “*We, the people*”. In another reference to the people, the preamble states that “*We therefore, through our freely elected representatives, adopt this Constitution*”. Despite the introduction of representatives into our democracy, the *people* remain central. This is not to deny that there is a definite connection between the will of the people and the elected representatives. In contrast to the apartheid past, “the people” are no longer seen in opposition to the State, but are viewed as the source from which the State derives its authority.⁹⁴ Central to this relationship is section 19 of the Constitution.

Section 19(3) of the Constitution guarantees the right to vote to all adult citizens. It thus provides South Africans with representation at the local, provincial and national levels. In the historical context of an apartheid state with a disenfranchised majority and a Parliament which only represented white interests, this is a fundamental achievement. As the Constitutional Court stated, the universality of the vote is “a badge of dignity” which “says that all people count”.⁹⁵ As discussed above, in Western democratic thought the main form of participation and protest is through the ballot.⁹⁶ Consequently, all citizens should have the ability to express their dissent and hold political powers accountable through their vote.

⁹³ See discussion in part 2 2 3 above, specifically footnotes 43 and 45. See also McKinley & Veriava *Arresting dissent* 5. The ANC, in its leading role, emphasised that the anti-apartheid struggle was more important than the struggle for economic and social freedom. Specifically, the rhetoric created was that the fight against apartheid would be prioritised over the fight against capitalism. The ANC had to convince the majority of South Africans that, once they were in possession of political power, the ANC would set about dealing with the economic demands/needs of that majority.

⁹⁴ Botha (2017) *Law, Democracy and Development* 223-224.

⁹⁵ *August v Electoral Commission* 1999 3 SA 1 (CC) para 17.

⁹⁶ See discussion under part 2 2 1 above.

2 4 2 Voter participation and a crisis of democracy

Despite the importance of the vote, statistics indicate a drop in voter turnout in national and local elections.⁹⁷ In the 1994 national elections, voter turnout was approximately 86 percent while in the 2014 national elections it was estimated at 57,1 percent.⁹⁸ Different explanations have been offered for the decrease in voter turnout.⁹⁹ One is that adult citizens have become politically apathetic. However, this seems unlikely given the high incidence of protests in South Africa.¹⁰⁰ The decrease in voter turnout is more striking when it is juxtaposed to the increase in protest action.¹⁰¹ This type of political disaffection is described by Christi van der Westhuizen as “institutional disaffection” rather than “political disengagement”.¹⁰² Citizens distrust representative institutions, but that is not to say that they have withdrawn from politics. On the contrary, they seek to hold representatives accountable through protests.¹⁰³ The lower voter turnout is thus based on choice rather than apathy. Those who choose not to vote do not necessarily abstain from participating in the democracy. This suggests that the vote is by no means the only mechanism through which citizens participate in South Africa’s democracy.

In the new constitutional dispensation, the trends in protest action have been an important indicator of the state of democracy. The early years of South Africa’s democracy, which comprised a transition period from the old regime to the new one, was not characterised by a high incidence of protest action. However, from the second decade of the constitutional democracy (namely from 2004), there has been a

⁹⁷ The voter turnout calculation is based on the eligible voters of voting age population (“VAP”) at each election.

⁹⁸ See C Schulz-Herzenberg “Trends in electoral participation, 1994-2014” in C Schulz-Herzenberg & R Southall (eds) *Election 2014 South Africa: the campaign, results & future prospects* (2014) 25.

⁹⁹ See the discussion of various explanations for declining voter participation in Schulz-Herzenberg “Trends in electoral participation, 1994-2014” in *Election 2014 South Africa: the campaign, results & future prospects* 32-39.

¹⁰⁰ See discussion under part 2 4 4.

¹⁰¹ See discussion under part 2 3 4.

¹⁰² C Van der Westhuizen “Democratising South Africa: towards a ‘conflictual consensus’” in H Botha, N Schaks & D Steiger (eds) *Das Ende des repräsentativen Staates? Demokratie am Scheideweg/The End of the Representative State? Democracy at the Crossroads* (2016) 75 84.

¹⁰³ 86.

substantial increase in protest action.¹⁰⁴ Initially, it appeared that these protests were largely directed at municipalities. Local government has been the sphere of government against which most South Africans have directed their frustrations. These frustrations are mostly explained on the basis of the failure of these institutions to provide services and therefore many of these protests have been labelled “service-delivery protests”. In 1995, the local election voter turnout was approximately 48 percent,¹⁰⁵ while in the recent 2016 elections it was 45%.¹⁰⁶ This figure compared to the national and provincial election turnout indicates that citizens are prone to prioritize national elections over local government elections. This trend is in line with the international trend with regard to participation in local elections.¹⁰⁷ It is nevertheless interesting to compare the low turnout in local government elections with the regularity of protests at this level.¹⁰⁸ It is difficult to draw definite conclusions, as it is not clear how many of the protestors themselves vote. However, local protests appear to indicate that the people feel that the representative model within local government has failed them.

The next section provides a brief discussion of the structure of local government, in an attempt to contextualise the protests at local government level. This will be helpful in analysing whether the nature of the protests are indicative of a failure of local government with regard to service delivery or democratic participation.

2 4 3 A failure of local government

The new constitutional dispensation brought about a change in local government. The “local sphere of government” is defined in chapter seven of the Constitution to

¹⁰⁴ Although there had been protests before this date during the new constitutional dispensation, analysts generally agree that from 2004 onwards the current phenomenon of “service delivery protests” began to substantially increase in regularity. See Alexander (2010) *Review of African Political Economy* 25.

¹⁰⁵ The estimate is based on statistical information as found in C Schulz-Herzenberg “A silent revolution: South African voters, 1994-2006” in S Buhlungu, J Daniel, R Southall & J Lutchman (eds) *State of the Nation South Africa 2007* (2007) 136.

¹⁰⁶ This estimate is based on information as provided by the Independent Electoral Commission. See Independent Electoral Commission *Local Government Election 2016: Voter Turnout Report* (2016) 1 and Independent Electoral Commission *Registration Statistics as at 01 Jun 2016* (2016).

¹⁰⁷ A Buthelezi and B Dollery “An exploratory analysis of local government failure in South Africa” (2004) 28 *Studies in Economics and Econometrics* 91 96.

¹⁰⁸ See the discussion under part 2 3 4 above.

consist of municipalities. Significantly, South Africa moved towards a decentralised system of local government through “developmental local government”.¹⁰⁹ This system of local government has specific constitutional objectives.¹¹⁰ The Constitution outlines the roles of the different spheres of government in schedules 4 and 5. It is important to understand these responsibilities because this is the basis on which budgets are set up, resources are assigned, and obligations understood, especially within the context of the realisation of the socio-economic rights enshrined in the Constitution. Local government is largely a space for meeting citizens’ daily economic and social needs.¹¹¹ Section 157(1)(a) of the Constitution specifically provides that one of the objects of local government is to provide “services to communities”. Schedule 4 and 5 place services (such as electricity, water, sanitation etc.) under the control of local government. The Municipal Systems Act 32 of 2000 elaborates on these and is most relevant to municipalities in relation to service delivery.¹¹² The dissatisfaction with local government therefore has largely been framed as “service-delivery” protests where citizens direct their service frustrations towards the local municipality.

The Constitution provides local government with a wide range of responsibilities regarding participation and accountability. Decentralisation is based on the principle that the local spheres are closer to the citizens and therefore can fulfil and understand the needs of their communities.¹¹³ The concepts of decentralisation and development, as the basis for local government, also indicate that local government is the space where citizens can participate in democracy. The Constitution provides that the objects

¹⁰⁹ J De Visser *Developmental Local Government: A Case-study of South Africa* (2005) 4.

¹¹⁰ Section 157(1) of the Constitution defines the objects of local government as:

- to provide democratic and accountable government for local communities;
- to ensure provision of services to communities in a suitable manner;
- to promote social and economic development;
- to promote a safe and healthy environment; and
- to encourage the involvement of communities and community organisations in matters of local government.

¹¹¹ For a full discussion on the different basic services generally understood to be within the ambit of municipalities see J Dugard “Urban Basic Services: Rights, Reality and Resistance” in M Langford, Cousins, J Dugard & T Madlingozi (eds) *Socio-Economic rights in South Africa: Symbols or Substance?* (2013) 278-282.

¹¹² See generally the objectives of the Municipal Systems Act 32 of 2000. See also sections 5, 6 and 73.

¹¹³ Mbazira (2013) 29 *SAJHR* 253.

of local government are to “provide democratic and accountable government” and “to encourage the involvement of communities and community organisations in matters of local government”.¹¹⁴ It is where representative government¹¹⁵ can be brought closer to citizens.

There are a variety of reasons which resulted in local government largely failing the objects set out in the Constitution and legislation.¹¹⁶ The majority of protests seem to have arisen because of poor municipal services or a lack of municipal services.¹¹⁷ It therefore appears as if there is an inherent link between the scale of protests and the failure of municipalities to provide adequate services.¹¹⁸ Citizens target their service delivery frustrations towards their municipalities as local government has specific constitutional and legislative obligations in this regard. However, not everyone agrees that protests at local level arise first and foremost from “service-delivery” issues.¹¹⁹ Buccus argues that the challenge possibly results from “a crisis of local democracy rather than what has often been referred to as a crisis of service delivery”.¹²⁰

The protests are about more than only service delivery. Local government has also failed to establish an adequate space for accountable, responsive and democratic government. Many protests have started specifically because municipalities did not

¹¹⁴ Section 157(1)(a) and (b) of the Constitution.

¹¹⁵ For a full analysis of representative democracy see chapter 4.

¹¹⁶ See Dugard “Urban Basic Services: Rights, Reality and Resistance” in *Socio-Economic rights in South Africa: Symbols or Substance?* (2013) 275-277 and 282-285. See also D Atkinson “Taking to the streets: has developmental local government failed in South Africa?” in S Buhlungu, J Daniel, R Southall & J Lutchman (eds) *State of the Nation South Africa 2007* (2007) 60-74. See further the brief discussion in Mbazira (2013) *SAJHR* 264-265.

¹¹⁷ S Booysen “With the ballot and the brick: the politics of attaining service delivery” (2007) 7 *Progress in Development Studies* 21–32. See further Dugard “Urban Basic Services: Rights, Reality and Resistance” in *Socio-Economic rights in South Africa: Symbols or Substance?* (2013) 275-277 and 282-285. See also Atkinson “Taking to the streets: has developmental local government failed in South Africa?” in *State of the Nation South Africa 2007* 60-74.

¹¹⁸ Atkinson “Taking to the streets: has developmental local government failed in South Africa?” in *State of the Nation South Africa 2007* 58-60.

¹¹⁹ Alexander (2010) *Review of African Political Economy* 25-26. See also Dugard “Urban Basic Services: Rights, Reality and Resistance” in *Socio-Economic rights in South Africa: Symbols or Substance?* (2013) 287-288.

¹²⁰ I Buccus “Burning schools point to a disconnect between communities and the State” (27-06-2010) *The South African Civil Society Information Service* <<http://sacsis.org.za/site/article/521.1>> (accessed 23-03-2017).

consult with the community.¹²¹ Various authors argue that protests occur where engagement fails.¹²² Even where protests are centred on service delivery, they are typically sparked by the inability of the municipality to interact with and listen to the needs of the community and to provide participatory spaces for citizens.¹²³ Furthermore, protests are sometimes targeted at corruption, nepotism, and maladministration by municipal councillors and staff.¹²⁴ Importantly, these protests are based on the assumption that *representatives* are failing, and do not necessarily imply that the *system* of local government is illegitimate. Protesters have mostly used the institutional spaces within local government first before engaging in protests.¹²⁵ This shows that although there may be a failure of local government, this failure may be a failure of the representatives rather than the failure of the representative model of local government. The “crisis of local democracy” may therefore be a case of institutional disaffection rather than a complete rejection of representative democracy. From this perspective, local protests are seen as an avenue for political participation within the representative model of government rather than as something opposed to it.¹²⁶

¹²¹ Booysen (2007) *Progress in Development Studies* 23-24. See also Atkinson “Taking to the streets: has developmental local government failed in South Africa?” in *State of the Nation South Africa 2007* (2007) 60-65.

¹²² Booysen (2007) 7 *Progress in Development Studies* 21-27. Booysen states that protestors use local protests as part of their political repertoire. Protests are seen as an addition to the vote and the institutional modes of democratic participation. Protests, from this perspective, are seen as a way to supplement local government democracy. See also Atkinson “Taking to the streets: has developmental local government failed in South Africa?” in *State of the Nation South Africa 2007* (2007) 70-72. Atkinson’s detailed analysis indicates that where there is a lack of engagement for a prolonged period, this will lead to protest.

¹²³ Atkinson “Taking to the streets: has developmental local government failed in South Africa?” in *State of the Nation South Africa 2007* 60-65.

¹²⁴ 66-69.

¹²⁵ Van der Westhuizen “Democratising South Africa: towards a ‘conflictual consensus’” in *The End of the Representative State? Democracy at the Crossroads* 75 86.

¹²⁶ J Brown *South Africa’s Insurgent Citizens* (2015) 16-20. For a full analysis of protest action as part of the institutional model of representative democracy see chapter 4.

2 4 4 Protest action in the new constitutional dispensation

2 4 4 1 Local, provincial or national protests?

As discussed above, protests have largely been directed towards local government. These protests are typically characterised as municipal service delivery protests.¹²⁷ Two points must be made in this regard. In the first place, these protests arise from frustrations relating both to service delivery and democratic participation. From the perspective of the citizens who protest, democratic participation and economic liberation are closely linked.¹²⁸ The institution of representative democracy was supposed to bring about socio-economic liberation.¹²⁹ Its failure to do so is at the same time interpreted as a failure in the functioning of democratic institutions. Secondly, the similar nature of complaints and frustrations throughout the country indicate that, although protests are targeted at local municipalities, the protests are not simply a local problem. Recent trends in protest action indicate that the issues underlying these protests are not essentially failure at a local level, but indicate a national and provincial crisis. In many cases, citizens have directed their national complaints towards the government which is situated closest to them, namely local government.¹³⁰ Most statistics regarding the trend in protest action have been framed in terms of local community protests” or “civic protests”.¹³¹ These statistics recognise that although many protests have been directed at a local level they are many times sparked by provincial or national level decisions.¹³² The macro-economic policy decisions made

¹²⁷ Interestingly these protests seem to heighten during periods closer to elections. However, there seems to be no direct relation between protest action and election periods. DM Powell, M O'Donovan & J de Visser “Civic protests barometer 2007-2014” *Dullah Omar Institute* (2015)10.

¹²⁸ L Stewart “Rights discourse and practices, everyday violence and social protests: Who counts as subject and whose lives are real in the neo-colonial South African nation state?” (2014) 18 *Law, Democracy and Development* 1 4-5.

¹²⁹ See discussion in part 2 2 3 below and specifically footnotes 43, 45 and 97.

¹³⁰ Booyesen (2007) *Progress in Development Studies* 23.

¹³¹ Powell, O'Donovan & de Visser “Civic protests barometer 2007-2014” (2015). This project specifically defines civic protest as “organised protest action within a local area which directly targets municipal government or targets municipal government as a proxy to express grievances against the state more widely”.

¹³² S Booyesen “Beyond the ballot and the brick: continuous dual repertoires in the politics of attaining service delivery in South Africa” in A McLennan & B Munslow (eds) *The politics of service delivery* (2009) 128–129. See also Atkinson “Taking to the streets: has developmental local government failed in South Africa?” in *State of the Nation South Africa 2007* 70-72.

by the national government influence the decisions made on a local scale,¹³³ while the local sphere of government takes a large brunt of the critique.

The trends in protest action indicate that while protest is framed largely as local municipal protests, the protests often reflect frustrations with national and provincial government. There are inherent problems with local government, but the current trends in protest action indicate how different communities mobilise and unify in order to connect problems in different municipalities and lay them at the door of the provincial and national government.

2 4 4 2 Trends in protest action and an element of “violence”

The increase in protest action directed towards government can be highlighted from 2004 onwards.¹³⁴ Various reports and projects have attempted to analyse protest action throughout South Africa. These reports rely on several sources of data and specifications, which do not necessarily produce exact numerical results or provide similar deductions on the nature of these protests. However, the numerical results produced are similar in many respects. The statistics indicate that there have been various fluctuations in the number of protests over different years. In 2009 there was an increase in protest action in comparison with the 2007/2008 period.¹³⁵ However, from 2010-2013 there was a steady decrease in the number of protests.¹³⁶ From 2014 onwards there was once again a spike in protests.¹³⁷ Recent statistics indicate that there has been a decrease in the number of local protests. These statistics also indicate that when there has been a decrease in the frequency of different protests,

¹³³ McKinley & Veriava *Arresting dissent* (2005) 24-42. In this analysis, the cost recovery system of the local government sphere is unpacked. This policy was a result of the macro-economic plan of national government. The cost recovery plan was facilitated by a substantial decrease in national government subsidies to local municipalities. This forced local government to “turn towards commercialisation and privatisation of basic services as a means of generating the revenue no longer provided by the national state”.

¹³⁴ For a full analysis of different protest action from 2004-2005 see Atkinson “Taking to the streets: has developmental local government failed in South Africa?” in *State of the Nation South Africa 2007* 60-74. See further Booysen (2007) *Progress in Development Studies* 21-27.

¹³⁵ DM Powell, M O'Donovan & J de Visser “Civic protests barometer 2007-2014” *Dullah Omar Institute* (2015)

5.

¹³⁶ 5.

¹³⁷ 5.

the protests tend to last longer and are not necessarily localised but spread to other surrounding communities.¹³⁸ The statistics do not provide an indication of the duration and extent of individual protest movements which last a longer period of time (possibly for days at a time) but are still quantified as one protest incidence.¹³⁹ Some of these statistics also do not consider all types of protest movements, such as “civil disobedience campaigns”.¹⁴⁰ Most statistics do not distinguish between incidences of protest action which are spontaneous and those which are organised by a social movement or forms part of a disobedience campaign.¹⁴¹

Although there have been fluctuations in protests, the amount of protests, specifically from 2004 onwards, is quite high, and it seems apt to describe South Africa as a “country of protest”.¹⁴² These protests take a variety of forms, including “mass meetings, drafting of memoranda, petitions, toyi-toying, processions, stay-aways, election boycotts, blockading of roads, construction of barricades, burning of tyres, looting, destruction of buildings, chasing unpopular individuals out of townships, confrontations with the police, and forced resignations of elected officials”.¹⁴³ Not all

¹³⁸ TC Chigwata, M O'Donovan & DM Powell “Civic Protests and Local Government in South Africa, Working Paper Series No. 2, The Civic Protests Barometer 2007 – 2016” *Dullah Omar Institute* (2017) 3 and 6. This project notes that although “civic protests are decreasing many of them are covering wide areas and lasting a long time”. For example, where a local community has a protest this sometimes results in a provincial crisis over time where various communities participate. For an example and full analysis of how protests in 2004 spread from one community to different communities, see Atkinson “Taking to the streets: has developmental local government failed in South Africa?” in *State of the Nation South Africa 2007* 54-58.

¹³⁹ TC Chigwata, M O'Donovan & DM Powell “Civic Protests and Local Government in South Africa, Working Paper Series No. 2, The Civic Protests Barometer 2007 – 2016” *Dullah Omar Institute* (2017) 5 -6.

¹⁴⁰ 5. This project refers to civil disobedience campaigns resulting in protest action that arise out of “grievances that are widely felt but which may not be specific to the area where the protest occurs”. Such protest action would be linked to social movements and larger organised campaigns, possibly beyond a local level.

¹⁴¹ T Madlingozi “Post-Apartheid Social Movements and Legal Mobilisation” in M Langford M, Cousins, Dugard J & Madlingozi T (eds) *Socio-Economic rights in South Africa: Symbols or Substance?* (2013) 93. In post-apartheid South Africa, there has been an increase in different social movement organisations and these are “made up collective marginalised actors who develop a collective identity; put forward change-orientated goals; who possess some degree of organisation; and who engage in sustained, albeit episodic, extra institutional collective action”.

¹⁴² Brown *South Africa's Insurgent Citizens* 13-14.

¹⁴³ Alexander (2010) 37 *Review of African Political Economy* 26.

of these types of protest fit within the activities protected by section 17 of the Constitution.¹⁴⁴ Various statistics regarding protest action indicate that there has been an increase in elements of violence in these protests. Although the use of violence places protests beyond the scope of constitutional protection in terms of section 17, it is nevertheless an important part of the social context of protests in South Africa.

Firstly, there is no evidence to indicate that protests in South Africa are inherently violent.¹⁴⁵ Furthermore, it must be noted that the violence of these protests is not always initiated by protestors, but is sometimes triggered by state repression and police violence.¹⁴⁶ Statistics which indicate an increase in violence include various definitions of what violence entails. In certain cases, violence is taken to include “potential violence” or a “threat of violence”, or protests which are “unauthorised”.¹⁴⁷ These statistics also do not distinguish between isolated acts of violence by individuals and cases where a large part of the collective participated in violent behaviour. Notwithstanding these qualifications, there has been an increase in destabilising tactics used in protest action which lead to violence and damage to property. These acts of violence include intimidation, looting, arson, damage to property and personal attacks.¹⁴⁸ Violence as an element of these protests shows the frustrations of the citizenry. These acts of violence seem to be aimed at destabilisation and disruption.¹⁴⁹

¹⁴⁴ Section 17 of the Constitution requires that freedom of assembly be exercised “peacefully and unarmed”. For an analysis of section 17 and the element of peaceful see chapter 3.

¹⁴⁵ While statistics indicate that there has been an increase in violent protests, the data used is based on information made available by the state and by the media coverage of these protests. Regarding media coverage, the media tends to mainly focus on violent protests which are newsworthy. This creates an impression that most protests are violent. See J Duncan *Protest Nation: the right to protest in South Africa* (2016) 145-162 and 183.

¹⁴⁶ See chapter 3 for a discussion of the State’s reaction and repression with regard to freedom of assembly and the Regulation of Gatherings Act.

¹⁴⁷ See Brown *South Africa’s Insurgent Citizens* 14-15. See also TC Chigwata, M O’Donovan & DM Powell “Civic Protests and Local Government in South Africa, Working Paper Series No. 2, The Civic Protests Barometer 2007 – 2016” *Dullah Omar Institute* (2017) 13.

¹⁴⁸ TC Chigwata, M O’Donovan & DM Powell “Civic Protests and Local Government in South Africa, Working Paper Series No. 2, The Civic Protests Barometer 2007 – 2016” *Dullah Omar Institute* (2017) 13.

¹⁴⁹ J Duncan *Protest Nation: the right to protest in South Africa* (2016) 23. Duncan distinguishes between disruptive protests and protests which are violent. However, based on the inconsistencies in data and media reports, the motives behind these protests are not always clear. It is difficult to separate the violence from the motive of protests regarding service delivery, political participation or party

The violence and intimidation may indicate the extent to which certain citizens will go to influence the decisions and policies of their representatives.¹⁵⁰

The increase in protest action and the element of violence in these protests indicate a frustration with conventional means of participatory and representative democracy. On the one hand, many protests can be said to fit within conventional understandings of institutional democracy, to the extent that they are aimed at strengthening communication between representatives and the citizenry.¹⁵¹ On the other hand, these protests constitute a type of democratic participation that is separate from, and sometimes challenges, conventional modes of democratic decision making and participation. The nature of these protests seems to be destabilising. Although authors argue that protests arise where other modes of participation fail,¹⁵² the violent and destabilising nature of the protests suggests that they are not necessarily always aimed at securing participation and consultation. In some cases, the protesters apparently do not want to be *heard*, but want to *decide*. This is not a form of representation, participation or deliberation¹⁵³ but rather a form of direct involvement and decision making.¹⁵⁴

2 4 4 3 The Marikana protests

As discussed above, the majority of protests within South Africa tend to be characterised as local service delivery protests. However, this framework does not account for the full range of protest action. Two noteworthy incidences which do not fit

protests which possibly are aimed at disruption but turn violent. It is clear however that there may be a link between the aim of disruption and protests which turn violent. See Brown *South Africa's Insurgent Citizens* 14-15.

¹⁵⁰ This is because they view protests as an avenue to hold representatives accountable to their obligations. Protesters use protests as a means to get the attention of their elected in order to ensure that they respond. The perception of protesters is that violence is a means to force the hand of politicians and that the more violent protests are, the more news coverage and the more responsive representatives and politicians become. Violent protests have a snowball effect which, from the perspective of the protesters, brings about change. See Booysen (2007) *Progress in Development Studies* 24-25.

¹⁵¹ Stewart (2014) *Law, Democracy and Development* 6-8.

¹⁵² Booysen (2007) *Progress in Development Studies* 21-27. See also footnote 130.

¹⁵³ For a full analysis of institutional models of democracy see chapter 4 and chapter 5.

¹⁵⁴ For a full analysis of direct democracy see chapter 4, and for a further analysis of extra-institutional models of democracy see chapter 5.

into the local protest framework, are the Marikana protests and #FeesMustFall movement.¹⁵⁵ The focus here will be on the Marikana protests. The Marikana protests of 2012 were a notable moment of post-apartheid South African protest politics and the use of state violence to repress dissent. Alexander provides the following summary of the events in Marikana which led to the death of many workers:

“On 16 August 2012 the South African police massacred 34 strikers participating in a peaceful gathering on public land outside the small town of Marikana. The workers’ demand was simple. They wanted their employer, Lonmin, to listen to their case for a decent wage. But this threatened a system of labour relations that had boosted profits for Lonmin, and had protected the privileges of the dominant union, the National Union of Mineworkers (NUM). It was decided to deploy ‘maximum force’ against the workers.”¹⁵⁶

The strikes and protests arose from wage negotiations and demands for a fair wage. They therefore concerned both section 23 of the Constitution, which deals with labour relations, and section 17.¹⁵⁷ While labour relations between Lonmin and its workers involved a private dispute between employer and employees, the relationship between participants in the wage negotiations was more complex than that. The strike was predominantly about wage negotiations, but at times concerned representation and participation within these negotiations. It could be argued that the nature of these protests were not only directed at private parties (Lonmin), but also targeted the public sphere because of the complex relationship between Lonmin and different state

¹⁵⁵ The FMF movement consisted of a diverse group of students across South Africa who protested in 2015, calling for no increment of fees in 2016 as well as free tertiary education. See generally Centre for the Study of Violence and Reconciliation *#Hashtag: An analysis of the #FeesMustFall Movement at South African universities* (2016). See further SABC “Students divided over Fees Must Fall outcome” (24-10-2015) SABC <<http://www.sabc.co.za/news/a/06d982004a5172109061db6d39fe9e0c/Students-divided-over-Fees-must-fall-outcome-20151024>> (Accessed 20-10-2017) and G Nicholson “Student Protest: Only the start of a greater pain” (28-09-2017) *The Daily Maverick* <<https://www.dailymaverick.co.za/article/2016-09-28-student-protests-only-the-start-of-greater-pain/#.WSHEJ2iGPIU>> (Accessed 26-10-2017).

¹⁵⁶ P Alexander “The massacre: A narrative account based on workers’ testimonies” in P Alexander, T Lekgowa, B Mmope, L Sinwelland & B Xezwi (eds) *Marikana: A View from the Mountain and a Case to Answer* (2012) 25. For a further analysis of the details of Marikana, see R de Villiers (ed) *We are going to kill each other today: The Marikana Story* (2013).

¹⁵⁷ For a discussion about the relationship between s 23 and 17 of the Constitution see chapter 3.

actors. Firstly, although Lonmin is a private party, the powers that controlled Lonmin had close links to the state and the ruling party.¹⁵⁸ Secondly, the political relationship between the National Union of Mineworkers (“NUM”) and the State indicates that the decisions of the representatives of workers in the NUM were largely based on political power and alliances.¹⁵⁹ Thirdly, the violent and abrupt reaction by the police is an instance of state repression¹⁶⁰ and situates the police as protectors of private interests (including the private interests of state actors).¹⁶¹

At times, the Marikana protests took the form of democratic participation outside the existing institutional modes of union representation and collective bargaining. The protests and mass meetings of mineworkers were not always only about contesting the decisions of the NUM or participating in a deliberative process of decision making.¹⁶² The mineworkers challenged the very system which had failed them. It was not protest within the institutionalised union discourse, but was external to it. It sought to introduce a possible new “direct form of decision making”.¹⁶³ As one mineworker stated “...we needed to inform NUM and tell them that we did not want it to represent us, we wanted to represent ourselves”.¹⁶⁴

¹⁵⁸ P Alexander “Marikana, turning point in South African history” (2013) 40 *Review of African Political Economy* 605 613. Cyril Ramaphosa, at the time of the protests, was the single largest shareholder of Lonmin and a member of the board of directors. He was a member of the ANC’s national executive and was a former secretary general of the ANC. He therefore had close links to the state, and the days before the strike “he used his influence to ensure the state’s active intervention on the side of Lonmin”.

¹⁵⁹ Alexander (2013) *Review of African Political Economy* 615. NUM, at the time, was one of the Congress of South African Trade Unions’ (“COSATU”) largest unions. The affiliation between COSATU (and specifically NUM) and the State was evident in the decisions made by NUM which were largely focussed on national politics. Furthermore, Cyril Ramaphosa was the first general secretary of NUM and at the time was a member of the ANC’s national executive.

¹⁶⁰ For a further analysis of the police repression of protest action see chapter 3.

¹⁶¹ Alexander (2013) *Review of African Political Economy* 613. See also M McClenaghan & D Smith “The British mine owners, the police and South Africa’s day of blood” (24-11-2013) *The Observer* <<https://www.theguardian.com/business/2013/nov/24/lonmin-mine-shooting-police>> (accessed 25-05-2017).

¹⁶² Brown *South Africa’s Insurgent Citizens* 21.

¹⁶³ 21.

¹⁶⁴ T Lekgowa, B Mmope, L Sinwell & B Xezwi “Interviews with Mineworkers” in P Alexander, T Lekgowa, B Mmope, L Sinwelland & B Xezwi (eds) *Marikana: A View from the Mountain and a Case to Answer* (2012) 130.

2 4 4 4 Political parties, social movements and contestation in a dominant party system

South Africa's democracy has been characterised as a dominant party democracy.¹⁶⁵ In the early years of South Africa's democracy, the ANC's dominance made it difficult for democratic pluralism and party-political competition to take root.¹⁶⁶ Opposition parties had limited support and the ANC increasingly equated itself with the people.¹⁶⁷ As a result, contestation generally occurred within the party itself and its alliance.¹⁶⁸ Opposition from outside the ANC came from social movements that used assemblies, demonstrations and the courtroom to challenge and hold the ANC accountable.¹⁶⁹ The growth of social movements and activist organisations in South Africa indicate that the plurality of South Africa's democracy resides not only in party-political competition but also in spaces of contestation and disruption opened up by these groups.

Even though the ANC was still in a dominant position after the 2014 national and provincial elections, things have started to change. The most recent local government elections have been indicative of this change as the ANC has lost control over key

¹⁶⁵ S Choudhry "He had a Mandate: the South African Constitutional Court and the African National Congress in a Dominant Party Democracy" (2009) 2 *Constitutional Court Review* 1.

¹⁶⁶ S Booysen "The will of the parties versus the will of the people? Defections, elections and alliances in South Africa" (2006) 12 *Party Politics* 727. Booysen analyses the period of 2000-2004 in order to illustrate the dominance of the majority party, the ANC, and its ability to weaken minority and opposition parties through floor crossing and defections to the ANC. The ANC was able to secure its dominance beyond two thirds of parliament. See also *United Democratic Movement v President of the Republic of South Africa & Others (African Christian Democratic Party & Others Intervening; Institute for Democracy in South Africa as amici curiae)* 2003 1 SA 488 (CC). This case dealt with the initial challenge to the constitutionality of the constitutional amendment which made floor crossing possible. See further R Southall "Opposition in South Africa: Issues and Problems" (2001) 8 *Democratization* 1-24.

¹⁶⁷ K Motau "ANC is incorruptible as an organisation because the ANC is the people of SA" (03-07-2017) <<http://ewn.co.za/2017/07/03/anc-is-incorruptible-as-an-organisation-because-the-anc-is-the-people-of-sa>> (accessed 04-08-2017).

¹⁶⁸ R Southall "The 'dominant party debate' in South Africa" (2005) 40 *Afrika Spectrum* 61 74-77; RB Mattes "South Africa: Democracy Without the People?" (2002) 13 *Journal of Democracy* 22 25-28.

¹⁶⁹ Brown *South Africa's Insurgent Citizens* 43-45; T Madlingozi "Post-Apartheid Social Movements and Legal Mobilisation" in *Socio-Economic Rights in South Africa: Symbols or Substance?* (2013) 92-130.

municipalities.¹⁷⁰ Political parties increasingly use demonstrations and protests to contest issues, sometimes in ways that are very confrontational.¹⁷¹

2.5 Conclusion

This chapter provides a social and historical context to protest action in South Africa. In doing so, it helps lay the groundwork for subsequent chapters in three respects. First of all, the chapter provides a historical overview of the development of the legal framework which regulates freedom of assembly in South Africa. It examines apartheid-era legislation which was aimed at repressing demonstrations and dissent, and places the adoption of the Regulation of Gatherings Act in historical perspective. It thus paves the way for the analysis of the constitutional and legal framework relating to freedom of assembly in chapter three.

Secondly, the chapter looks at the history of protest politics in South Africa and the dissent culture which has been inherited from the anti-apartheid struggle. The grassroots level politics of the street was instrumental in disrupting and destabilising the apartheid legal and political order. While 1994 brought with it an institutionalised form of democracy based on universal adult suffrage, the current trend in protest action indicates that the politics of the street has once again become an important tool for change. Grass roots level protests are aimed at ensuring that local government fulfil constitutional obligations regarding service delivery and socio-economic obligations. The protests are also a mechanism to put pressure on the representative institutions of government and to ensure that the voices of the people are heard. By placing protests within a historical perspective and by examining some of the contemporary trends, the chapter seeks to gain a better understanding of the nature and causes of protest action in South Africa.

¹⁷⁰ See Independent Electoral Commission *Local Government Election 2016: Results* (2016). See also R Munusamy “LGE2016 Results: ANC takes battering while opposition heads for coalition talks” (05-07-2016) < <https://www.dailymaverick.co.za/article/2016-08-05-lge2016-results-anc-takes-battering-while-opposition-heads-for-coalition-talks/#.WhCxSoVOLmQ> > (accessed 10-10-2017).

¹⁷¹ See for example G Nicolson “EFF vs. ANC: a march towards violence” (27-08-2014) < <https://www.dailymaverick.co.za/article/2014-08-27-eff-vs.-anc-a-march-towards-violence/#.WfHg1miCzIU> > (accessed 03-07-2017); P Phakgadi “EFF protesters: Zuma must be arrested” (08-08-2017) < <http://ewn.co.za/2017/08/08/eff-protesters-zuma-must-be-arrested> > (accessed 24-08-2017).

Thirdly, by placing protests within a historical and social context, the chapter raises questions about the relationship between the politics of the street and institutionalised politics. Can protests after 1994 be viewed as an attempt to hold democratic representatives to account and to ensure that the voices of those at the margins of society are heard in the democratic process? Or are they aimed at the disruption and destabilisation of representative institutions? These questions are important in view of the analyses, in chapters four and five, of the capacity of different models of democracy to explain the nature, scope and importance of freedom of assembly. They are, however, very complex. The chapter argues, with reference to the decrease in voter turnout and the increase in protest action, that citizens increasingly are becoming disillusioned with the institutional side of democracy. At the same time, many protests are directed at representative institutions, particularly at local government level, which may suggest that protesters do not altogether reject the legitimacy of these institutions. On the other hand, the violent and disruptive nature of many protests seems to indicate that protests cannot simply be understood through the lens of institutionalised forms of democracy. Protests are spaces of contestation and disruption. Moreover, as the discussion of the Marikana protests shows, protests are not only directed at state institutions, but at a variety of interests, including political parties, trade unions, employers and businesses.

Chapter 3

3 Freedom of Assembly: The Constitutional and Legislative Framework

3 1 Introduction

This chapter examines the nature and scope of the right to freedom of assembly, as guaranteed in section 17 of the Constitution, in view of the values underlying it and other supporting provisions in the Bill of Rights.

The chapter then proceeds to examine the legislative framework relating to the section 17 right, with particular focus on the regulation of assemblies and demonstrations under the Regulation of Gatherings Act 205 of 1993 (“Regulation of Gatherings Act”), and limitations of this right in terms of the Act. The provisions of the Act dealing with the procedures to be followed in organising demonstrations and gatherings, and the role to be played by the police and local authorities, are evaluated. Reference is also made to the ways in which the police and local authorities exercise their powers in terms of the Act.

The chapter then turns to an analysis and critique of the leading South African case law on freedom of assembly, particularly the judgments of the High Court, Supreme Court of Appeal and Constitutional Court in the case involving the *South African Transport and Allied Workers Union*. This chapter provides insights into the interpretation given to the right to assemble by the legislature, executive and judiciary, and their often restrictive views of the role of this right in our democracy. The recent High Court judgment in *S v Mlungwana* (“*Mlungwana*”)¹ will also be explored, with reference to the notice requirements of the Regulation of Gatherings Act and the criminal sanctions attached to the violation of these provisions.

3 2 The Constitution and protest action

Section 17 of the Constitution guarantees the right of every person to assemble, demonstrate, picket and petition. The recognition of assembly as a fundamental right is in accordance with international and regional instruments such as the African Charter on Human Rights² and the International Covenant on Civil and Political

¹ *S v Mlungwana and Others* 2018 1 SACR 538 (WCC).

² Article 11 of the African Charter on Human and Peoples’ Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217. This article states that “every individual shall have the right to assemble freely with others”.

Rights.³ Section 17 is also comparable to provisions in the constitutions of other countries, such as the United States Constitution⁴ and the Basic Law of the Federal Republic of Germany,⁵ which similarly recognise freedom of assembly as a fundamental right. This highlights the universal importance of this right. However, the inclusion of assembly is not only an imitation of international trends, but is also a reflection of the historical importance attached to protest and dissent in South Africa.⁶

Section 17 is not the only right contained in the Constitution which protects those engaged in protest action and demonstrations. Various other constitutional rights are also relevant to assemblies and protests. These include freedom of expression (section 16), freedom of association (section 18), political rights (section 19) and rights pertaining to labour relations (section 23). However, since section 17 is the primary right dealing with assemblies and demonstrations, it will be the main focus of this chapter.

3.2.1 *Textual analysis of section 17*

Section 17 refers to four different activities. The inclusion of the conjunction “and” indicates that each of these activities (namely assembly, demonstration, petition and picketing) enjoys separate constitutional protection as a fundamental right.

It is necessary to firstly analyse “assembly” and “demonstration”. The South African Constitution is unique in that both are included. Various jurisdictions only refer to “assembly” in their Constitutions.⁷ There is no definite constitutional or statutory

³ Article 21 International Convention on Civil and Political Rights (adopted 16 December 1966, entered into force 3 January 1976) 999 UNTS 171. This article states that “the right of peaceful assembly shall be recognized”.

⁴ The First Amendment of the Constitution of the United States of America (15 December 1791) states: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people *peaceably to assemble, and to petition* the Government for a redress of grievances.” (emphasis added)

⁵ Article 8 of the German Basic Law states:

“(1) All Germans shall have the right to assemble peacefully and unarmed without prior notification or permission.

(2) In the case of outdoor assemblies, this right may be restricted by or pursuant to a law.”

⁶ See chapter 2 specifically part 2.3.

⁷ Article 8 of the Basic Law of the German Basic Law refers only to assembly and the First Amendment of the Constitution of the United States of America only refers to assembly and petitions as indicated in footnotes 3 and 4. The Canadian Charter of Rights and Freedoms only refers to assembly. The

definition which clearly differentiates between assembly and demonstration⁸ in the South African context. Woolman states that demonstrations are “associated with some form of support or opposition for a moral or political position”, whereas assemblies are “gatherings that may or may not have political content”.⁹ It is important to note that various other jurisdictions consider demonstration as a form of assembly.¹⁰ The text of section 17 however indicates that the drafters of the Constitution determined that demonstration required specific protection. The inclusion of “demonstration” in addition to assembly seems to be an intentional attempt by the drafters of the Constitution to provide for a broader and more extensive protection for people exercising associative rights.

In including freedom to present petitions, section 17 is similar to the first amendment of the United States Constitution which also provides for petitions towards Government. Although there is debate whether petitions should be recognised as a separate fundamental right that is enforceable against the state,¹¹ its inclusion at the very minimum requires the state to take note of such petitions and in certain cases to provide a response.¹² Picketing is also an interesting inclusion within section 17 as the

Canadian Charter makes a distinction between “freedoms” and “rights”, and “freedom of peaceful assembly” is included as a fundamental freedom rather than a right.

⁸ Demonstrations are defined within the Regulation of Gatherings Act. However, this definition does not clearly distinguish between assemblies and demonstrations. See the discussion under part 3.3.

⁹ S Woolman “Assembly, Demonstration and Petition” in I Currie & J de Waal (eds) *The Bill of Rights Handbook* 6 ed (2013) 377 386.

¹⁰ O Salat *The Right to Freedom of Assembly: A Comparative Study* (2015) 5.

¹¹ Theme Committee 4 “Schematic Report on Freedom of Assembly, Demonstration and Petition” (9 October 1995). Paragraph 13.2.1 states:

“Although the right to petition is not guaranteed in international declarations and treaties, and in most bills of rights, this fact does not preclude its inclusion in the new Constitution. The FF sees no justification in linking the right to petition to the right to assemble and demonstrate, and opposes the inclusion of a right to petition because it would create the impression that there is an onus on the authorities to give effect to the demands contained in it. Guaranteeing the right to petition in the same section as the right to assemble will, however, not exclude any protection with regard to the submission of petitions within any other context than that of an assembly or demonstration. The right to petition cannot be interpreted to impose a duty on authorities to comply with petitions.”

¹² Woolman “Assembly” in *The Bill of Rights Handbook* 387.

very nature of picketing in South Africa has been linked to labour disputes.¹³ Its inclusion in section 17 seems to indicate that the right to picketing is not only relevant within the context of employee-employer relations but can also feature with regard to social protests between private parties.¹⁴

Section 17 of the Constitution provides that the assembly must be exercised “peacefully and unarmed”.¹⁵ Woolman refers to “peacefully and unarmed” as an internal modifier of the right in section 17 of the Constitution.¹⁶ Any assembly must be peaceful and unarmed to enjoy the protection of section 17. The inclusion of the word “peaceful” indicates that the section recognises that an assembly can easily become “violent”.¹⁷ It is difficult to categorically define non-violent or peaceful “protest” without reference to the context of each assembly or demonstration. To give peaceful and unarmed ordinary fixed meaning without cognisance of the context may create a problem,¹⁸ since protest action is by its very nature confrontational.¹⁹ The meaning and interpretation of peaceful and unarmed is a contentious issue. Other jurisdictions may provide certain assistance in interpreting “peaceful”. The requirement in the German Basic Law that an assembly must be peaceful has been interpreted by the German Federal Constitutional Court to mean that there may be no acts or threats of physical violence against persons or property.²⁰ In addition, the German jurisprudence recognises that the rights of freedom of assembly of the collective should not be limited based on individuals partaking in unlawful or violent acts.²¹

¹³ The Labour Relations Act 66 of 1995 provides for significant protection for trade unions with respect to picketing in s 69 and the Code of Good Practice on Picketing published under GN 765 in GG 18887 of 15 May 1998. See also the discussion below in part 3 1 2.

¹⁴ S Woolman “Freedom of Assembly” in S Woolman & M Bishop (eds) in *Constitutional Law of South Africa* 2 ed (OS 2007) 43-24.

¹⁵ See 2 4 4 2.

¹⁶ See Woolman “Freedom of Assembly” in *CLOSA* 43-3.

¹⁷ See Woolman “Freedom of Assembly” in *CLOSA* 43-19. Woolman argues that section 17 should be read to channel the very violence “intrinsic” in assembly and demonstration. Rather than seeking to limit and destroy such potential violence, it seeks to direct it in a constitutional manner.

¹⁸ These problems are highlighted in the case of *South African Transport and Allied Workers Union v Garvas* 2013 1 SA 83 (CC). See further the analysis of “peaceful” under part 3 3 1.

¹⁹ Salat *The Right to Freedom of Assembly* 108.

²⁰ Brokdorf 69 BVerfGE 315, 360 (1985).

²¹ See Woolman “Freedom of Assembly” in *CLOSA* 43-20. See also Salat *The Right to Freedom of Assembly* 109.

The addition of “unarmed” in the text of section 17 provides particular problems within the South African context of protest action. The legislature has enacted certain statutes to provide greater clarification regarding the regulation of dangerous weapons and the control of firearms.²² Although these statutes have amended certain sections of the Regulation of Gatherings Act, the definitions relating to dangerous weapons do not necessarily provide clarity regarding “unarmed”. The question is whether being “armed” necessarily means possession of a “dangerous weapon”.²³ This lack of clarity creates a problem with relation to the cultural link between certain traditional “weapons” and protest action. Section 30 and 31 of the Constitution provide for the protection of language, cultural and religious rights. It could be argued that where protesters wear traditional attire or carry traditional weapons, this would be protected under section 30 and 31 and therefore would not necessarily be interpreted as “armed” for the purposes of section 17. However, this is unclear and although legislation has been promulgated in relation to dangerous weapons, there still seems to be a lack of clarity.²⁴

3 1 2 Supporting values and related rights in the Constitution

Section 17 is underpinned by various values and is complemented by a number of other rights in the Constitution. Freedom of assembly is seen as central to our democracy.²⁵ It is a fundamental right which creates space for dialogue and communication,²⁶ and which provides the electorate with an opportunity to voice their opinions and a platform for democratic participation.²⁷

²² Dangerous Weapons Act 25 of 2013 and the Firearms Control Act 60 of 2000. See further the discussion below under part 3 2 3.

²³ The Dangerous Weapons Act 25 of 2013 defines a dangerous weapon as “any object, other than a firearm, which is likely to cause serious bodily injury if it were used to commit an assault”. See further the discussion below under part 3 2 3.

²⁴ Dangerous Weapons Act 25 of 2013 and the Firearms Control Act 60 of 2000. See further the discussion below under part 3 2 3. See also P du Toit and G Ferreira “The regulation of the possession of weapons at gatherings” (2013) 16 *PER* 361.

²⁵ *South African Transport and Allied Workers Union v Garvas* 2013 1 SA 83 (CC) para 61. For a full analysis of the relation between freedom of assembly and democratic theory see the discussion in chapter 4 and 5.

²⁶ Woolman “Freedom of Assembly” in *CLOSA* 43-2.

²⁷ Woolman “Freedom of Assembly” in *CLOSA* 43-3. See also Salat *The Right to Freedom of Assembly* 49.

The interpretation of the rights contained in the Bill of Rights should be informed by the *democratic* values of equality, human dignity and freedom.²⁸ Although section 17 does not use the word “freedom” in relation to assembly, demonstration, picketing and petitioning, it is generally accepted that section 17 protects the right of *freedom* of assembly. Evidently, *freedom* of assembly must have the value of *freedom* involved in its interpretation. In liberal democratic thought, the individual’s liberty is the rationale for the protection of freedom of assembly and other freedom based rights such as free speech, religion and association.²⁹ Individuals are *free* to do what is not prohibited by law.³⁰ A distinction is often made between positive and negative freedom. Negative freedom, which is the type of freedom emphasised in classical liberal thought, is defined as freedom to act without interference by other persons or the State.³¹ This understanding of freedom is primarily concerned with the protection of individual autonomy from external limits imposed by the State.³² Positive freedom is concerned with the individual’s ability to exercise his/her own will and have a platform to pursue his/her idea of the “good life”.³³ It is said to promote individual self-actualisation and self-determination.

These understandings of the value of freedom are useful in the interpretation of freedom of assembly.³⁴ When viewed through the lens of negative freedom, the right to assemble or demonstrate is conceived in terms of freedom from external limits imposed by the State. When viewed from the perspective of positive freedom, the right is understood in terms of the need for a space in which individuals can actualise themselves, participate in political life and control the space which surrounds them.

²⁸ S 7 and 39(1) of the Constitution of the Republic of South Africa, 1996.

²⁹ Liberty and freedom are interrelated and may even be viewed as interchangeable concepts. *Ferreira v Levin NO and Others* 1996 1 SA 984 (CC) para 52. On the difference between freedom as a right and freedom as a “mere” liberty, see Salat *The Right to Freedom of Assembly* 39 and 53.

³⁰ Salat *The Right to Freedom of Assembly* 39.

³¹ *Ferreira v Levin NO and Others* 1996 1 SA 984 (CC) para 52-54.

³² Para 54.

³³ Para 50. Justice Ackermann states, with reference to Isaiah Berlin, that positive freedom answers the question of “What, or who, is the source of control or interference that can determine someone to do, or be, this rather than that?”. See further I Berlin *Two Concepts of Liberty* (1969) 121-122 as quoted by Justice Ackermann in *Ferreira v Levin NO and Others* 1996 1 SA 984 (CC) para 52.

³⁴ Salat *The Right to Freedom of Assembly* 33 and 54.

When freedom of assembly is viewed through the lens of freedom and human dignity, which is closely associated with freedom,³⁵ the emphasis tends to be on the individual and individual personality rights.³⁶ There is, however, a danger in overstating the individual dimensions of the right at the expense of its collective dimensions.³⁷ Freedom of assembly at its core finds its power not in the voice of the individual but in the voice of “the people” as a collective.³⁸ Therefore, while the values of human dignity and freedom may at times individualise the right, an associative right such as freedom of assembly must be seen in the context of group interaction. Freedom of assembly is a right which is exercised together with other people – it presupposes a group, a crowd or a mob coming together. Additionally, it is a form of collective action through which other rights are vindicated, through which the interests of groups or classes of persons are advanced, or through which solidarity with others can be expressed.³⁹

Apart from the idea of individual and collective freedom, freedom is closely connected to the revolutionary nature of society and the collective.⁴⁰ Revolution can be said to be the epitome of freedom, where society (or the individual as part of society) challenges the status quo and creates something new.⁴¹ This may highlight

³⁵ Salat *The Right to Freedom of Assembly* 54. See further *Ferreira v Levin NO and Others* 1996 1 SA 984 (CC) para 49. For a further discussion of dignity as a foundation of the right to freedom see F du Bois “Freedom and the Dignity of Citizens” (2008) *Acta Juridica* 112. Du Bois discusses the reason for using dignity as opposed to autonomy as a foundation for freedom.

³⁶ Salat *The Right to Freedom of Assembly* 33 and 54.

³⁷ Ackermann J himself is of the view that a wide definition of freedom need not be premised on the idea that the individual exists in isolation from the community. He stated in *Ferreira v Levin NO and Others* 1996 1 SA 984 (CC) para 52:

“The fact that the right to freedom must, in my view, be given a broad and generous interpretation at the first stage of the enquiry, must therefore not be thought to be premised on a concept of the individual as being in heroic and atomistic isolation from the rest of humanity, or the environment, for that matter..”

In addition, human dignity, considered from the view of the dignity of *groups*, may serve to reinforce freedom from the collective perspective. See J Waldron “The Dignity of Groups” (2008) *Acta Juridica* 66.

³⁸ Woolman “Freedom of Assembly” in *CLOSA* 43-1.

³⁹ See part 3 5 2 where reference is made to para 92 of *S v Mlungwana* 2018 1 SACR 538 (WCC).

⁴⁰ R Berkowitz “Revolutionary constitutionalism: Some thoughts on Laurie Ackermann’s jurisprudence” (2008) *Acta Juridica* 204 207.

⁴¹ Berkowitz (2008) *Acta Juridica* 207.

the power of the people to challenge and work outside of and untampered by the structures of representative and participatory institutions.⁴² This type of revolutionary freedom is quite appropriate to describe the type of freedom which was expressed in the challenge (specifically through protest) to the apartheid constitutional order.⁴³ The focus was not only on the deprivation of the freedom of the individual but also that of the collective.

Equality as a democratic value⁴⁴ can also help guide the interpretation of political rights like freedom of assembly.⁴⁵ Firstly, political equality is seen as an important prerequisite of a democracy.⁴⁶ Political equality is expressed through the notion “one person, one vote”, which is specifically protected under section 1(d) and section 19 (political rights) of the Constitution. There is a political element to section 17 when read with section 19.⁴⁷ This formal equality however does not provide a basis for understanding the inherent political inequalities which exist in South Africa between different groups. Section 17, understood through the democratic value of equality, can be used to challenge political inequality or the exclusion of the poor and marginalised from meaningful political participation.⁴⁸ The procedural role of the vote and a restrictive idea of political equality may minimise the role of political participation and political equality in political communities beyond the vote.⁴⁹ When read through the lens of substantive equality, section 17 has the capacity to challenge political and

⁴² Berkowitz (2008) *Acta Juridica* 211-212. Berkowitz here discusses how representative government may stifle public freedom. See also the discussion under chapter 2 and chapter 5.

⁴³ See chapter 2 part 2 3.

⁴⁴ S 7(1) and s 39(1)(a) of the Constitution.

⁴⁵ H Botha “Equality, Plurality and Structural Power” (2009) 25 *SAJHR* 1, 4, 10, 11 and 16.

⁴⁶ R Dahl *On Democracy* (1998) 36. According to Dahl there are certain criteria to determine whether there is political equality. These are effective participation, voting equality, enlightened understanding, control of the agenda and the inclusion of adults. See also K Malan “Faction rule, (natural) justice and democracy” (2006) 21 *SA Public Law* 142 144-145.

⁴⁷ Woolman “Freedom of Assembly” in *CLOSA* 43-22. Although section 17 may often be used as a political right, it should also protect those assemblies which are not political in nature. Section 19 (political rights) of the Constitution intersects and overlaps with section 17. Section 19(1)(c) provides for the right of every citizen to campaign for a political party or cause. Campaigning for a political party or cause in this sense may include participating in a demonstration, picket or signing a petition.

⁴⁸ Botha (2009) *SAJHR* 10-16.

⁴⁹ Botha (2009) *SAJHR* 10-16; H Botha “Representing the poor: law, poverty and democracy” (2011) *Stell LR* 521 524-525, 539.

social exclusion, by enabling the advocacy of causes that are drowned out through institutionalised democratic processes.⁵⁰ It is also significant that section 17 does not distinguish between citizens and non-citizens. Therefore, section 17 allows for those who cannot vote to participate in political processes of will formation.

Beyond the democratic value of equality and the political rights contained in section 19 of the Constitution, there are also other rights in the Constitution which are interrelated with freedom of assembly and may help inform its interpretation. As highlighted by the Constitutional Court, section 16-19 of the Bill of Rights are grouped together as they collectively are essential to a democracy.⁵¹ Therefore, freedom of assembly has a close connection with these rights. Firstly, freedom of assembly is closely related to freedom of expression as provided for in section 16 of the Constitution.⁵² The differentiation between these rights as two separate fundamental rights is an important consideration in South African jurisprudence as freedom of assembly is not seen as simply an extension of expression.⁵³ It is a fundamental right on its own and there is no hierarchy of rights which supports the idea that expression is more important than assembly. In many cases, those exercising the right to assemble will attempt to convey a certain idea or message. The content of this idea or message is sometimes seen as more important than the act of the demonstration itself.⁵⁴ However, there are various reasons why speech (or the content) should not be privileged over the conduct/act of demonstration. To privilege speech over assembly would minimise and misunderstand the context and the power of assembly and

⁵⁰ Botha (2009) 25 *SAJHR* 10-16; H Botha "Rethinking the right to vote" (2015) 26 *Stellenbosch Law Review* 486 508-512.

⁵¹ See *Case & Another v Minister of Safety and Security & Others*; *Curtis v Minister of Safety and Security & Others* 1996 3 SA 617 (CC) at para 27 where Mokgoro J describes the right to freedom of expression (as contained in the Interim Constitution) "as part of a web of *mutually* supporting rights . . . [which] together may be conceived as underpinning an entitlement to participate in an ongoing process of communicative interaction that is of both instrumental and intrinsic value" (emphasis added). See also *S v Mamabolo* 2001 3 SA 409 (CC) at para 28 where Kriegler J states: "That freedom to speak one's mind is now an inherent quality of the type of society contemplated by the Constitution as a whole and is specifically promoted by the freedoms of conscience, expression, assembly, association and political participation protected by sections 15 to 19 of the Bill of Rights."

⁵² *South African National Defence Union v Minister of Defence* 1999 4 SA 469 (CC) paras 7-8.

⁵³ Woolman "Freedom of Assembly" in *CLOSA* 43-21.

⁵⁴ 43-21.

demonstration.⁵⁵ Botha makes this point by stating that “a neat separation between speech and action is untenable, as action also has expressive value”.⁵⁶ This is an important consideration as conduct in protest action can be symbolic in nature. The time, place and manner of protest has expressive value in itself and communicates the “content” or message in an act rather than through “pure speech”.⁵⁷ Another important consideration is that the conduct and power of crowds have expressive value. Demonstrations and assemblies are an important democratic tool because they provide those whose voices are not otherwise heard, an avenue to participate. Moreover, they recognise the power of the physical presence of the collective. There is an inherent power in the bodies of the collective.⁵⁸

Freedom of assembly is also closely connected with section 18 of the Constitution, which guarantees freedom of association. There is an overlap between these two rights, and it could be said that the very power of assemblies lies in the ability of people to associate, communicate and gather together to exercise collective power. Woolman makes the point that the thread which links all the justifications for associational freedom is *social capital*. Woolman describes social capital as “... a function of our collective effort to build and to fortify the things that matter”.⁵⁹ He goes on to state that “[s]ocial capital emphasises the extent to which our capacity to do anything is contingent upon the creation and maintenance of forms of association which provide both the tools and the setting for meaningful action”.⁶⁰ Freedom of association therefore provides those who wish to demonstrate with the ability to organise and exercise their collective effort to bring about meaningful action. Associational freedom makes collective action possible as it transforms individual will and power into collective political action.⁶¹ As highlighted above, freedom of assembly gains its power from a group. Therefore, section 17 would be quite meaningless if people did not have

⁵⁵ H Botha “Fundamental rights and democratic contestation: reflections on freedom of assembly in an unequal society” (2017) 21 *Law, Democracy and Development* 221 15

⁵⁶ 15.

⁵⁷ 15. Botha also points out that where there is a privileging of different types of speech over others it makes it “more difficult to express certain ideas or to highlight certain injustices”.

⁵⁸ 16.

⁵⁹ S Woolman “Freedom of Association” in S Woolman & M Bishop (eds) in *Constitutional Law of South Africa* 2 ed (OS 2007) 44-1 44-5.

⁶⁰ Woolman “Freedom of Association” in *CLOSA* 44-1 44-5.

⁶¹ 44-6.

the associational freedom to transform their individual will and interact with other people in a group.

Section 23 (Labour Relations) of the Constitution contains specific provisions which deal with strike action. In South Africa's context there is an inherent link between protest action and labour rights. Many of the strike actions organised in terms of section 23 (and the Labour Relations Act 66 of 1995) must also comply with the Regulation of Gatherings Act. The overlap between the two sections is evident from the fact that there was debate surrounding the inclusion of the right to picket within the ambit of section 17 and not in section 23.⁶² Furthermore, the Labour Relations Act specifically refers to protest action to promote or defend socio-economic rights.⁶³ Therefore, the right of workers to protest is specifically dealt with and protected under section 23, which is further elaborated through the LRA, which links together the right to protest, workers' rights and socio-economic issues. Additionally, cases dealing with labour protests touch upon both sections 17 and 23.⁶⁴

3 3 The legislative framework: The Regulation of Gatherings Act

3 3 1 *The preamble and section 1*

The preamble to the Regulation of Gatherings Act is an important point of departure for the interpretation and understanding of the Act.⁶⁵ Even though the Act predates the final Constitution, the preamble seems to be closely related to the wording of section 17. It states:

"WHEREAS every person has the right to assemble with other persons and to express his views on any matter freely in public and to enjoy the protection of the State while doing so;

⁶² Theme Committee 4 "Schematic Report on Freedom of Assembly, Demonstration and Petition" (9 October 1995). Page 12 of the Report states that: "Picketing in labour disputes is not dealt with in section 27 of the Interim Constitution. If it were not to be included in a new section dealing with labour relations, it would be covered by the horizontal application of the proposed right which is a non-contentious issue". The committee was thus of the view that it was unnecessary to mention the right to picket in section 23 of the Final Constitution, as it would in any event be applicable to the employee-employer relationship through the horizontal application of section 17. See further Woolman "Freedom of Assembly" in *CLOSA* 43-343-25.

⁶³ S77 of the Labour Relations Act 66 of 1995.

⁶⁴ See the discussion of *South African Transport and Allied Workers Union v Garvas* 2013 1 SA 83 (CC) in part 3 3. See also chapter 2 part 2 4 4 3.

⁶⁵ See the historical analysis of the Regulation of Gatherings Act 205 of 1993 in chapter 2.

AND WHEREAS the exercise of such right shall take place peacefully and with due regard to the rights of others.”⁶⁶

The preamble resonates with section 17 to the extent that it includes the words “right to assemble” and “peacefully”. It also seems to make an important link between assembly and freedom of expression through the inclusion of “express his views”. The Act seeks to give effect to the rights of expression and assembly while at the same time balancing these rights against the rights of others.

Nevertheless, the Act possibly presents quite a few difficult constitutional issues.⁶⁷ Section 1 of the Act provides for the definitions. A few of these definitions are difficult to reconcile with section 17 of the Constitution. Firstly, the Act arbitrarily distinguishes between a demonstration and a gathering. A demonstration “includes any demonstration by one or more persons, but not more than 15 persons, for or against any person, cause, action or failure to take action”.⁶⁸ Where the number is greater than 15, it would qualify as a “gathering. A gathering is defined in the Act as:

“any assembly, concourse or procession of more than 15 persons in or on any public road as defined in the Road Traffic Act, 1989 (Act 29 of 1989), or any other public place or premises wholly or partly open to the air-

(a) at which the principles, policy, actions or failure to act of any government, political party or political organization, whether or not that party or organization is registered in terms of any applicable law, are discussed, attacked, criticized, promoted or propagated; or

(b) held to form pressure groups, to hand over petitions to any person, or to mobilize or demonstrate support for or opposition to the views, principles, policy, actions or omissions of any person or body of persons or institution, including any government, administration or governmental institution”.

The Act places arduous notification requirements on the organisers of such a gathering.⁶⁹ The distinction between a gathering and demonstration does not rest on any clear difference other than the numerical limit.⁷⁰ The Act does not distinguish

⁶⁶ Preamble to the Regulation of Gatherings Act 205 of 1993.

⁶⁷ See part 3 4 and 3 5.

⁶⁸ S 1 of the Regulation of Gatherings Act 205 of 1993.

⁶⁹ S 2 and 3 of the Regulation of Gatherings Act.

⁷⁰ It has been submitted that this numerical distinction is arbitrary. This point was specifically noted in the case of *S v Mlungwana and Others* 2018 1 SACR 538 (WCC) para 79. See also the argument made by Counsel M Bishop regarding the arbitrary nature of such a distinction where he contends that there

between the type or purpose of a gathering or demonstration.⁷¹ The definition of gathering is also not clear with regard to what type of assembly is required to conform to these severe requirements contained in the Act. The nature of the assemblies contemplated in the definition seems to have some sort of political purpose or nature, however (b) broadens that purpose beyond only a political purpose. The purpose of the Act is to “regulate the holding of public gatherings and demonstrations at certain places”. The preamble emphasises that the “exercise of such right shall take place *peacefully* and with due regard to the *rights of others*” (emphasis added). It would therefore seem that the numerical limit and the arduous requirements for the holding of gatherings are perceived as necessary to prevent threats to public order.⁷² However, in terms of this definition of gathering, certain “pressure groups” who pose minimal or no threat would still have to go through the onerous requirements based on the perceived threat that *all* gatherings pose.⁷³ What is evident from the definitions of demonstrations and gatherings is that they have practical implications for those exercising their section 17 rights, as non-compliance with the Act results in quite serious liability and sanctions for offenders.⁷⁴

The definition of riot damage also poses problems. Riot damage is defined as:

“any loss suffered as a result of any injury to or the death of any person, or any damage to or destruction of any property, caused directly or indirectly by, and immediately before, during or after, the holding of a gathering.”

This definition is very broad. The inclusion of “any loss”, “any injury”, “any damage” and “any property” indicates that there is no limit or qualification to the type of damage

is “no magic about the number 16 that suddenly requires police intervention” at paragraph 96 and also para 128 of M Bishop “Heads of Argument” in *S v Mlungwana and Others* 2018 1 SACR 538 (WCC). The distinction is made irrational and arbitrary specifically when it is coupled with the arduous notification requirements and the possibility of criminal liability (which might ensue in terms of s 12 of the RGA).

⁷¹ Woolman “Freedom of Assembly” in *CLOSA* 43-23. See discussion above under part 3 2 1.

⁷² Woolman “Freedom of Assembly” in *CLOSA* 43-28. See further P Hjul “Restricting freedom of speech or regulating gatherings?” (2013) 27 *De Jure* 456.

⁷³ Woolman “Freedom of Assembly” in *CLOSA* 43-23. Woolman, in a footnote, uses the examples of a church gathering (convocation) which would possibly have to meet all these requirements. The possible threat of criminal sanction (in terms of s 8 and 12) should then lead to the definition of gathering (and other provisions) being declared invalid for vagueness.

⁷⁴ S 11 of the Regulation of Gatherings Act 205 of 1993.

or the nature of such damage which qualifies as riot damage. In addition, the definition refers to damage caused “directly or indirectly” by the gathering. The context of the cause of the damage is not considered at all. It seems that any connection between “any loss” experienced by someone and the gathering itself would qualify as riot damage. This is quite arduous for organisers of gatherings.⁷⁵ Consequently, where the exercise of section 17 rights is done in a peaceful and unarmed manner, and all legislative and regulatory requirements are complied with, *any* damage which occurs will still be classified as *riot* damage. This definition seems to assume that protests are synonymous with riots, irrespective of whether they are peaceful or not.

3 3 2 Section 3, 4, 5 and 6

Section 3 of the Act sets out the procedures dealing with notifications for gatherings while section 4 provides for consultations and negotiations. One of the seemingly progressive inclusions in the Act was the requirement for notice of gatherings. This inclusion is in line with other jurisdictions.⁷⁶ The notice requirement was a break from the past when organisers had to obtain permission for assemblies.⁷⁷ However, the notice seems to be a burdensome process for the organisers of gatherings which places significant limitations on the right to assemble. In addition, the very detailed information required to be included in such a notice places a great burden on conveners.⁷⁸ Many times, these gatherings are not based on membership of a group/organization. In these cases, the convener will not necessarily have the resources to provide such information as required by section 3.⁷⁹ It is important to

⁷⁵ See the discussion of *South African Transport and Allied Workers Union v Garvas* 2013 1 SA 83 (CC) under part 3 4 and s 11 of the Regulation of Gatherings Act.

⁷⁶ Salat *The Right to Freedom of Assembly* 55. The Basic Law for the Federal Republic of Germany article 8 guarantees the right to assemble without permit or notification but paragraph II allows for limitations for assemblies under the open sky. There is a requirement for advance notice for outdoor assemblies.

⁷⁷ See above the discussion of the history of freedom of assembly within South Africa under chapter 2.

⁷⁸ Woolman “Freedom of Assembly” in *CLOSA* 43-8.

⁷⁹ Conveners are central to the organization of protest action in this context. This point was specifically made in *S v Mlungwana* 2018 1 SACR 538 (WCC) where the court provided in para 93 that “the role of conveners is fundamental to the strength and number of participants to exert influence in pursuance of social justice change”. Furthermore the court stated at para 83:

“At the heart of any demonstration or gathering is a convener, who after having identified certain conduct which requires the members of the community to gather and express their frustration or displeasure. In other words, it is difficult to imagine a gathering and or demonstration which did not commence with someone convening it.”

make brief mention of *Mlungwana* in the context of notice requirements. The facts and details of this case are dealt with in sufficient detail below.⁸⁰ However, it must be noted that in this case the constitutionality of the notification requirements in section 3 of the Act was not challenged. Rather section 12(1)(a) of the Act was under constitutional scrutiny, namely the criminalisation of the actions of a convener who convenes a gathering without giving notice in terms of the Act. In regard to the notice requirements, the court specifically provided:

“It is clear from the wording of s 3 that its primary intent is to ensure that such gatherings are managed and occur in an orderly manner, with minimal disruption and that any risk of violence and/or unruly behaviour is mitigated to the greatest extent.”⁸¹

Furthermore, the court in this case confirmed that the notice requirement served a legitimate purpose.⁸² This does however not mean that the section 3 notice requirement meets the constitutional standard and/or the limitation enquiry in terms of section 36 of the Constitution. For example, even if the wording and requirements of a notice for gatherings are seen as reasonable and justifiable in an open and democratic society, the wide discretion afforded to the local authorities (as contained in section 5 of the Act) to prohibit such a gathering, may place unreasonable restrictions on the right to assemble.⁸³ Therefore although notice may serve a legitimate purpose, the practical exercise and wide discretion of the local municipality and police serve to undermine the exercise of the right.⁸⁴

The Act requires a 7 day or 48 hour notice period to be given to the authorities. Once such notice has been given by the convenor, section 4 of the Act requires the responsible officer of the local authority to consider whether there needs to be consultations, negotiations, amendment of notices, or conditions placed on the gathering. If the responsible officer determines that negotiations or meetings are unnecessary, the gathering may continue as indicated in the section 3 notice. However, if the responsible officer determines otherwise, he or she is required to inform the convenor of negotiations to take place. The convenor must be given notice of these negotiations within 24 hours of the original notice handed over to the local authorities in terms of section 3. The time period as contained in section 3 and 4 for

⁸⁰ See below at part 3 5 1.

⁸¹ Para 29 of *S v Mlungwana* 2018 1 SACR 538 (WCC).

⁸² Para 55.

⁸³ See below at part 3 5 1.

⁸⁴ See below at part 3 5 1.

the process of organising a gathering is quite arduous on conveners. In practice these procedures and requirements – and the ways in which they are implemented – place formidable obstacles in the way of protest action and significantly narrow the scope for dissent outside the bounds of institutional politics.⁸⁵ An important element of a gathering is the immediate response of communities or organisations to important and pressing issues and possible decisions by government.⁸⁶ Therefore the timing of such a gathering is instrumental to the nature of the fundamental right. Although s 12(2) does provide for spontaneous assemblies,⁸⁷ this can be used in very limited circumstances and to prove spontaneity a large organisation would require any members of such gathering to indicate that the gathering as such could not have been planned or prevented (other than in such a spontaneous fashion).⁸⁸ The notice period provides government with enough time to prevent such dialogue or dissent through the use of stalling tactics in terms of section 4 and eventually the use of section 5 to exercise their discretion to prohibit the gathering. This is an example of how local government sometimes abuses the process to withhold “permission”.

Section 5 provides a local authority with discretionary powers to prohibit a gathering based on a perceived threat brought to the attention of the local authority through “credible information”. The threat is in relation to “serious disruption of vehicular or pedestrian traffic, injury to participants in the gathering or other persons, or extensive damage to property, and that the Police and the traffic officers in question will not be able to contain this threat”.⁸⁹ This section is extremely broad. The Act does not provide clarity regarding what “credible” information would be. Section 5 does provide that it should be “credible information on oath”, but “information on oath” does not necessarily make the information credible. The section also does not provide detail regarding the nature of the threat. For example, what qualifies as a serious disruption

⁸⁵ S Woolman “My tea party, your mob, our social contract: Freedom of Assembly and the Constitutional right to rebellion in *Garvis v SATAWU (Minister for Safety & Security, Third Party)* 2010 (6) SA 280 (WCC)” (2011) 27 *SAJHR* 346 348.

⁸⁶ Woolman “Freedom of Assembly” in *CLOSA* 43-9.

⁸⁷ S 12(2) states: “It shall be a defence to a charge of convening a gathering in contravention of subsection (1) (a) that the gathering concerned took place spontaneously.”

⁸⁸ See also para 84 of *S v Mlungwana* 2018 1 SACR 538 where the court states:

“Again, it must be emphasised that even if spontaneity is a defence, it does not exempt an accused person from the necessity to prove it. A court may well find that on the facts, no spontaneity was established.”

⁸⁹ S 5(1) of the Regulation of Gatherings Act.

of traffic? Additionally, the section does not stipulate the degree or likelihood of the threat occurring beyond the inclusion of the type of threat. This is placed within the discretion of the authority. This discretion provides the local authority with the opportunity to make very subjective or arbitrary decisions even where there is no threat or if the threat is unlikely to occur. This is quite problematic as a gathering may always pose some sort of threat, as the very nature of an assembly in certain cases is confrontational. The amount of people involved will always pose a “threat” to traffic.

Section 6 of the Act deals with the review and appeal process. When a condition is imposed regarding a gathering (in terms of section 4(4)(b)) or when a gathering is prohibited (in terms of section 5(2)), the convener may apply to a magistrate to set aside such a condition or prohibition. However, this process must be initiated within 24 hours of the notice received by the convener from the responsible officer in terms of either section 4(5)(a) or section 5(3). It is quite possible that local authorities abuse this timeline in order to ensure that the gathering does not take place. If the consultation process as contained in section 4 takes place within the 7-day period before such a gathering, but the local authority informs a convener 24 hours before the date of the gathering in terms of section 5(3) that the gathering has been prohibited, the convener only has 24 hours to apply to a magistrate for the setting aside of such prohibition. Even if such prohibition is set aside, the magistrate’s decision will be on the date of the planned gathering itself or at a later time.⁹⁰

In addition to all the limitations discussed above, the content and context of the gathering could create a difficulty for those who wish to exercise their right to assemble. An example of such a limitation on a gathering would be where a community wishes to protest against police brutality or a municipal council. In such a case, the organisers of the protest would be asking for “permission” to assemble from the very authorities that they are dissenting against.⁹¹

3 3 3 Section 8 and limitations on the conduct of protesters

The Act also prescribes the conduct of gatherings and demonstrations in section 8. This section provides the basis upon which the Act regulates the conduct of those

⁹⁰ Woolman “Freedom of Assembly” in *CLOSA* 43-8-43-14. Woolman discusses how the local authorities use the process in order to prevent gatherings from occurring.

⁹¹ 43-8-43-14.

exercising their section 17 rights. Section 8 does not seem to be problematic at first glance because it determines undesirable conduct, but the negative manner in which it is stated creates certain presumptions about the behaviour of crowds.⁹² Section 8 regulates the conduct of participants who are exercising their section 17 rights. This is an indication of what limitations may be placed on the conduct of participants exercising their right to assemble and demonstrate. One would therefore assume that the text of section 8 would not only make it clear what conduct is permissible but should also provide an indication of how the limitations on conduct should be interpreted and how these limitations should operate within the ambit of the powers of the organisers of the gathering.

Section 8(1), (2) and (9) place positive obligations on the convener; however, the positive obligations are in relation to *preventing* conduct. Section 8(1) provides for the appointment of marshals to “control the participants”. Section 8(9) provides that “reasonable steps” should be taken by the marshals to prevent certain conduct which results in entrances being barred by participants. The premise of these obligations appears to be straightforward, but there are no guidelines with regard to what “reasonable steps” entail. The section thus indicates what conduct should be prohibited but gives no indication of *how* such conduct should be prohibited, that is, how conveners should ensure that the section 17 right is exercised within the limits imposed by the Act.⁹³ Section 12(1)(c) provides that it will be a criminal offence if a person “contravenes or fails to comply with any provision of section 8 in regard to the conduct of a gathering or demonstration”. The Act therefore prescribes the bounds of section 17 conduct by imposing limitations rather than allowing for the positive exercise of the right. It thus takes a negative view of assemblies, and attempts to limit negative conduct before a gathering occurs. This could result in the limitation of legitimate conduct in the exercise of section 17 rights. There is a lack of clarity with regard to which conduct is within the bounds of sections 17 protection and which conduct constitutes a criminal offence.⁹⁴

Section 8(4) of the Act is linked to the constitutional requirement in terms of section 17 that an assembly and demonstration should be “unarmed”. Section 8(4)(a) requires

⁹² Hjul (2013) *De Jure* 452.

⁹³ 454.

⁹⁴ See part 3 5 2 and 3 5 3 where the nature of criminal liability is discussed with specific reference to section 12(1)(a) and *S v Mlungwana* 2018 1 SACR 538 (WCC).

that no participant may possess a firearm or anything resembling a firearm. Section 8(4)(b) is more problematic to interpret in the context of South African protests. It requires that a participant may not be in possession of a “dangerous weapon” as defined in the Dangerous Weapons Act 15 of 2013. The definition of a dangerous weapon in section 1 of the Dangerous Weapons Act is “any object, other than a firearm, designed as a weapon and capable of producing death or serious bodily harm, if it were used for an unlawful purpose”. This definition is problematic in the context of the traditional “weapons” often in possession of protesters during gatherings.⁹⁵ Although these traditional weapons are sometimes used for cultural reasons rather than with the intent to cause unlawful harm, section 8(4) does not provide for such a requirement of intent.⁹⁶ Therefore, every participant who carries such traditional weapons at a gathering would contravene the section and therefore commit a criminal offence in terms of section 12 of the Regulation of Gatherings Act.⁹⁷ What makes this criminalisation in terms of section 12 of the Regulation of Gatherings Act more problematic is that the Dangerous Weapons Act criminalises the possession of dangerous weapons only if the possession of the dangerous weapon raises a “reasonable suspicion that the person intends to use the dangerous weapon for an unlawful purpose”.⁹⁸ Therefore it requires a reasonable suspicion that there is intent. Section 8(4) of the Regulation of Gatherings Act contains no such requirement.

The Act does not only regulate the conduct of gatherings and demonstrations but also expression and speech. The link between speech and conduct in relation to

⁹⁵ P du Toit and G Ferreira “The Regulation of the possession of weapons at gatherings” (2013) 16 *PER* 360.

⁹⁶ du Toit and Ferreira (2013) *PER* 359.

⁹⁷ 359-360. It must be noted that the Dangerous Weapons Act provides in section 2 that it does not apply to “possession of dangerous weapons during the participation in any religious or cultural activities”. This does not mean that the carrying of traditional weapons for the purposes of cultural and religious activities is not prohibited in terms of section 12 of the Regulation of Gatherings Act. This is because section 8(4) of the Act only refers to the definition of “dangerous weapons” and not the Act as a whole (which would then include section 2 of the Dangerous Weapons Act).

⁹⁸ Section 3(1) of the Dangerous Weapons Act 15 of 2013.

assembly (as discussed above) is dealt with in section 8(5)⁹⁹ and (6).¹⁰⁰ Section 8(5) provides for the incitement of hatred and section 8(6) provides for the encouragement of violence. These provisions are closely related to the wording of section 16 of the Constitution which provides that the protection of free expression does not extend to “incitement of imminent violence” and “advocacy of hatred”.

Section 8(7) provides: “No person shall at any gathering or demonstration wear a disguise or mask or any other apparel or item which obscures his facial features and prevents his identification”. The purpose of this provision is to ensure that police or local authorities are able to identify participants who possibly engage in undesirable conduct indicated in section 8. However, this provision creates problems in practice as participants in assemblies sometimes fear that police will target participants to dissuade protest action and group mobilisation. There have been various alleged cases of police targeting and harassing leaders of movements to prevent gatherings and assemblies.¹⁰¹ Therefore, although the purpose of section 8(7) seems straightforward, the provision is problematic in view of the antagonistic context within which the participants of protest action and police interact with each other.¹⁰² The Act should not be seen in isolation from the way in which the police view gatherings. Section 8 proscribes specific instances of undesirable conduct and then also gives a wide discretion to police in terms of section 9 with regards to the handling of such conduct.

⁹⁹ Section 8(5) provides that: “No person present at or participating in a gathering or demonstration shall by way of a banner, placard, speech or singing or in any other manner incite hatred of other persons or any group of other persons on account of differences in culture, race, sex, language or religion.”

¹⁰⁰ Section 8(6) provides that: “No person present at or participating in a gathering or demonstration shall perform any act or utter any words which are calculated or likely to cause or encourage violence against any person or group of persons.”

¹⁰¹ MC Dawson “Resistance and Repression: policing protest in post-apartheid South Africa” in Handmaker J & Berkhout R (eds) *Mobilising Social Justice in South Africa: Perspectives from Researchers and Practitioners* (2010) 105, 106 & 107. See further D McKinley & A Veriava *Arresting dissent: State repression and post-apartheid social movements* (2005) 43-54.

¹⁰² See discussion below under part 3.2.4.

3 3 4 Section 9 and the conduct of police

Police responses to protests often show an overly restrictive understanding of the right to assemble.¹⁰³ Although police action is sometimes necessary, the use of force in many instances indicates a fear on the part of the local authorities and police of any dissent, even where such dissent may be disruptive, but not violent.¹⁰⁴ This is borne out by acts of police brutality and interactions between protesters and the police that are particularly confrontational.

Section 9 provides the police with additional powers in the context of gatherings. There are various problems with the text of section 9. Section 9(2)(a)-(e) provide a wide ambit of what an officer may do if the officer has “*reasonable grounds* to believe that danger to persons and property, as a result of the gathering or demonstration” may occur.¹⁰⁵ There is no indication of what “reasonable grounds” are or what they entail. Police are thus provided with a wide discretion, which may lead to abuse. An officer may use force to disperse a crowd (excluding the use of weapons likely to cause serious bodily injury or death).¹⁰⁶ The force used must however be “necessary and proportionate” in the circumstances.¹⁰⁷ This still provides a wide discretion to the police. The very nature of gatherings is disruptive and sometimes disorganised,¹⁰⁸ and therefore there may be cases where police in good faith use force, even where such force is not necessary.¹⁰⁹ Section 9(2)(d) and (e) make provision for the use of force in more extreme circumstances. This force is not described as deadly force; however, it includes the use of firearms. It provides for such force where there is a “manifest intention” to seriously injure/kill or destroy/seriously damage property. This provides the police officer with a discretion to determine whether the participant shows such an intention even before such conduct has occurred. It seems reasonable that such a

¹⁰³ Dawson “Resistance and Repression” in *Mobilising Social Justice in South Africa* 105, 106 & 107.

¹⁰⁴ For an analysis of the increase in public order policing after the 2008 xenophobic attacks see M Marks & D Bruce “Groundhog Day? Public order policing twenty years into democracy” (2014) 27 *South African Journal of Criminal Justice* 347 366-367.

¹⁰⁵ S 9(2)(a) of the Regulation of Gatherings Act (emphasis added).

¹⁰⁶ S 9(2)(b) of the Regulation of Gatherings Act. The officer must first attempt to disperse the crowd in terms of s 9(2)(a). If the crowd does not disperse in the allotted time as provided by the officer in terms of s 9(2)(a), the officer may give the order for force in terms of s 9(2)(b).

¹⁰⁷ S 9(2)(c).

¹⁰⁸ Hjul (2013) *De Jure* 460.

¹⁰⁹ 455.

discretion is given as the police should have the power to prevent violence and property damage before it occurs. The discretion granted by the Act is not necessarily a problem, but the actual exercise of this discretion has been seen to be problematic. South Africa's police force have on occasion abused this discretion to carry out acts of police brutality and controversial authoritarian practices.¹¹⁰ There are various cases where the police escaped liability based on their expressed belief that the protests might possibly turn violent. In South Africa, this discretionary power has resulted in the death of various protestors who may not have shown such an intent.¹¹¹ It is also not clear whether the relevant police officers have the required training and capacities to determine such an intent.¹¹²

The conduct of the police regarding gatherings is not only determined by the provisions of section 9, but also by how the police view protest action. Police officers frequently abuse the powers afforded to them or misunderstand the provisions due to inadequate training.¹¹³ Some guidelines have been created to assist police with crowd management and performing their duties in terms of the Regulation of Gatherings Act. The SAPS Standing Order (General) No. 262 on Crowd Management during Gatherings and Demonstrations provides guidelines to police officers on what they should do and how they should operate.¹¹⁴ It is a brief document, but provides a simpler and more extensive guideline to police officers regarding the process

¹¹⁰ J Duncan *Protest Nation: the right to protest in South Africa* (2016) 26, 52 and 130. See page 124 particularly, where police are alleged to have used live ammunition because the police considered these protests to be "unrest-related". See also J Burger "To protect and serve: restoring public confidence in the SAPS" (2011) 36 *SA Crime Quarterly* 13 – 22.

¹¹¹ Marks & Bruce (2014) *South African Journal of Criminal Justice* 365-366. Of specific note is the death of Andries Tatane at the hands of police at a service delivery protest which gained media attention. All the police officers accused of causing his death were acquitted. See M de Waal "Remembering Andries Tatane, not forgetting police brutality" (18-04-2011) <<https://www.dailymaverick.co.za/article/2011-04-18-remembering-andries-tatane-not-forgetting-police-brutality#.WffqQGicZlU>> (accessed 03-07-2017). The Marikana Protests are also examples of police violence which caused deaths. See chapter 2, specifically part 2 4 4 3.

¹¹² Marks & Bruce (2014) *South African Journal of Criminal Justice* 360-364.

¹¹³ Hjul (2013) *De Jure* 455.

¹¹⁴ The purpose of the Standing Order is to regulate crowd management during gatherings and demonstrations in accordance with democratic principles of the Constitution and acceptable international standards.

contained in the Regulation of Gatherings Act.¹¹⁵ The Policy and Guidelines¹¹⁶ published by the Ministry of Police provide an indication of how the police view protest action and seek to address the problems with regard to gatherings and demonstrations. The Policy considers the shortcomings regarding the Public Order Policing unit, the lack of training of the police, and the resultant problems with violence and intimidation. It recognises the importance of gatherings and assemblies in a constitutional democracy, but does not recognise shortcomings beyond a lack of training and procedural mistakes in relation to the Act. It also does not address problems such as the intentional use by the police of violent and intimidation tactics to dissuade protests.¹¹⁷ The police also target and harass those identified as protest leaders before a gathering or demonstration occurs.¹¹⁸ Sometimes senior police officials instruct lower ranking officials to use forceful and intimidation tactics in order to protect their political or economic interests.¹¹⁹ The problem with state repression is that it either prevents or dissuades people from participating in gatherings or results in participants themselves becoming violent in reaction to state repression.¹²⁰ The Policy documents and Standing Orders may indicate that there has been progress with regard to the regulation of gatherings, but in practice these documents are often not followed.¹²¹

3 3 5 Conclusion: Legislative framework and executive action

It is evident from the discussion above that the legislative framework places formidable obstacles in the way of the exercise of the rights contained in section 17 of the Constitution. The Act imposes onerous requirements and places serious

¹¹⁵ Section 11(3) of the Standing Order (General) No. 262 on Crowd Management also provides a more detailed analysis of when force can be used and what type of force may be used.

¹¹⁶ Ministry of Police "Policy and Guidelines: Policing of Public Protests, Gatherings and Major Events" (2013).

¹¹⁷ Dawson "Resistance and Repression" in *Mobilising Social Justice in South Africa* 119-120.

¹¹⁸ T Madlingozi "Post-Apartheid Social Movements and Legal Mobilisation" in *Socio-Economic Rights in South Africa: Symbols or Substance?* (2013) 110 and 116. See further Dawson "Resistance and Repression" in *Mobilising Social Justice in South Africa* 119-124.

¹¹⁹ See the *Marikana Report 2015* which indicates that there was evidence of collusion between mining officials, labour unions and members of the executive in order to suppress these protest actions.

¹²⁰ Dawson "Resistance and Repression" in *Mobilising Social Justice in South Africa* 119-120.

¹²¹ Madlingozi "Post-Apartheid Social Movement" in *Socio-Economic rights in South Africa* 110 and 116. See further Dawson "Resistance and Repression" in *Mobilising Social Justice in South Africa* 119-124.

restrictions on organisers of gatherings. In addition, it provides wide discretionary powers to local authorities and police.

The interpretation and enforcement of the Act by Local Government authorities and the police also leave much to be desired. Too often, these authorities use their wide discretion to abuse their powers. They also do not abide by the requirements of the Act, because they misunderstand the importance of the right to freedom of assembly or attempt to usurp the purpose of the Act.

It is important to analyse the way in which the judiciary interprets the section 17 right and the Regulation of Gatherings Act. Although the courts have emphasised the importance of freedom of assembly in various judgments,¹²² *South African Transport and Allied Workers Union v Garvas*¹²³ (“SATAWU”) is the leading South African case on freedom of assembly. The importance of the judgment lies not only in the conclusions reached and orders made by the Constitutional Court, but also in the reasoning of that Court – and of the High Court and Supreme Court of Appeal before it – in relation to freedom of assembly. The SATAWU case indicates *how* the judiciary interacts with freedom of assembly. The analysis above in 3 3 has not discussed section 11 of the Act regarding liability of organisers for damages. This was the central issue in the SATAWU case and will be dealt with in the course of the analysis of judicial interpretations of freedom of assembly. Furthermore, the High Court case of *Mlungwana* is a significant recent case which highlights the criminal sanctions imposed by section 12 of the Regulation of Gatherings Act (which was not discussed above in 3 3) and the possible unconstitutionality of section 12(1)(a).

3 4 Analysis of *South African Transport and Allied Workers Union v Garvas* 2013 1 SA 83 (CC)

3 4 1 Facts and background

The South African Transport and Allied Workers Union organised a gathering in terms of the Regulation of Gatherings Act on 16 May 2006.¹²⁴ The gathering followed

¹²² *South African National Defence Union v Minister of Defence* 1999 4 SA 469 (CC); *S v Mamabolo* 2011 3 SA 409 (CC); *Growthpoint Properties Ltd v South Africa Commercial Catering and Allied Workers Union (SACCAWU) and Others* 2011 1 BCLR 81 (KZD); *South African National Defence Union v Minister of Defence and Others* 2004 4 SA 10 (T).

¹²³ *South African Transport and Allied Workers Union v Garvas* 2013 1 SA 83 (CC).

¹²⁴ *Garvis v SATAWU (Minister of Safety and Security, third party)* 2010 6 SA 280 (WCC) para 1.

on a national strike action within the security industry by members of the union. The national strike action – which occurred before the gathering on 16 May 2006 – had resulted in the alleged loss of 50 lives.¹²⁵ The Union had however complied with all the procedural requirements of the Regulation of Gatherings Act.¹²⁶ It had given notice to local authorities in terms of section 3 of the Act and had gone through the consultation/meeting process in terms of section 4. The Union had also advised its members to refrain from unlawful and violent conduct.¹²⁷ During these consultations, the police had also devised an “operational plan”.¹²⁸ In terms of the Act, the Union had complied with all material requirements,¹²⁹ yet during the organised gathering the protest action resulted in damage to the private property of the respondents. The respondents sought to hold the Union liable for “riot damages” in terms of section 11(1) of the Regulation of Gatherings Act which reads:

“(1) If any riot damage occurs as a result of-

(a) a *gathering*, every organization on behalf of or under the auspices of which that gathering was held, or, if not so held, the convener;

(b) a demonstration, every person participating in such demonstration, shall, subject to subsection (2), be *jointly and severally liable* for that riot damage as a joint wrongdoer contemplated in Chapter II of the Apportionment of Damages Act, 1956 (Act 34 of 1956), together with any other person who unlawfully caused or contributed to such riot damage and any other organization or person who is liable therefor in terms of this subsection.”¹³⁰

It was not denied that private property damage had occurred and the union itself conceded that the gathering “descended into chaos”.¹³¹ The union therefore raised the only defence in terms of the Act, namely the defence contained in section 11(2):

“(2) It shall be a defence to a claim against a person or organization contemplated in subsection (1) if such a person or organization proves –

(a) that he or it did not permit or connive at the act or omission which caused the damage in question; and

¹²⁵ Para 6.

¹²⁶ Para 11.

¹²⁷ Para 11.

¹²⁸ *South African Transport and Allied Workers Union v Garvas & Others* 2011 6 SA 382 (SCA) para 17.

¹²⁹ *South African Transport and Allied Workers Union v Garvas & Others* 2011 6 SA 382 (SCA) para 22 to 27. The court provides a careful explanation of the procedural requirements of the Act.

¹³⁰ Emphasis added.

¹³¹ *South African Transport and Allied Workers Union v Garvas & Others* 2011 6 SA 382 (SCA) para 1.

(b) that the act or omission in question did not fall within the scope of the objectives of the gathering or demonstration in question and was not reasonably foreseeable; and
(c) that he or it took all reasonable steps within his or its power to prevent the act or omission in question: Provided that proof that he or it forbade an act of the kind in question shall not by itself be regarded as sufficient proof that he or it took all reasonable steps to prevent the act in question.”

The Union reasoned that it had taken all reasonable steps to ensure that the gathering took place “peacefully and without incident”.¹³² It argued that section 11(2) should be read to mean that, if it had taken all reasonable steps to prevent what was reasonably foreseeable, then any damage which occurred would be outside the spectrum of what it could have done to prevent it.¹³³ In the alternative, the Union also contended that although such steps were taken, the defence in section 11(2) was unavailable because of the qualification contained in section 11(2)(b), namely that “the act or omission was not reasonably foreseeable”. The contention was firstly that the words “was not reasonably foreseeable” cause section 11(2)(b) to be internally inconsistent and irrational, thus rendering it constitutionally invalid.¹³⁴ The main contention related to the relation between section 11(2)(b) and (c), and the inclusion of the word “and”. The inclusion of “and” required the Union to satisfy both requirements for the defence to succeed. However, the contention was that it is impossible to take *reasonable* steps to prevent an act that must also be *reasonably* unforeseeable. In addition, the union contended that section 11(2) leads to extensive liability and would have the effect of infringing on the constitutional right to assemble and demonstrate. It submitted that section 11 had a chilling effect on section 17 of the Constitution as organizations would be deterred from protesting if there was a possibility of such liability being attached to them.

¹³² Para 21. Counsel for the Union indicated that all steps were taken in terms of the Act (section 3, 4 and 5) and additionally all steps were taken to ensure that the “foreseeable damage” that might occur would not occur. Therefore, the union accepted that they foresaw the possibility, but took all reasonable steps to prevent the act that caused such damage.

¹³³ Woolman “My tea party, your mob, our social contract” (2011) *SAJHR* 350-351.

¹³⁴ *South African Transport and Allied Workers Union v Garvas* 2013 1 SA 83 (CC) para 26.

3 4 2 High Court and Supreme Court of Appeal

The judgments of the High Court and the Supreme Court Appeal were quite similar, both in terms of their reasoning and the order made. For this reason, this analysis deals with the most important issues dealt with by both courts.

The manner in which the courts set out the facts of the case is significant. The High Court contextualises the facts by stating that the gathering escalated into a full-scale riot.¹³⁵ The court also mentions that the march was organised within a volatile milieu.¹³⁶ The court seems to accept that gatherings and riots are closely related. It does not emphasise the importance of the right in a democracy, but appears to view the right as having an inherently negative destabilising character. The court views destabilisation and disturbance as a social ill. Gatherings lead to riots. Riots cause damage. Therefore, the right to protest is a danger. This type of presumptive language and reasoning by the courts indicate that “freedom” of assembly is only a freedom if there are *no* indications of any disturbance.

Both courts set out the detailed procedure necessary to organise a gathering.¹³⁷ Both courts use these provisions in order to provide context to section 11 of the Act and both courts accept that the Union has done everything required in order to proceed with the gathering in terms of the Act.¹³⁸ The court accepts that the prescribed process of organising a gathering (providing for notice, negotiations, consultations etc.) was designed to minimise the risk of any problems occurring. The reason why the process involving the conveners, police and local authority is so arduous and extensive, is to ensure that all parties involved can cover all possible occurrences. Interestingly, the court accepts that the union has done this, but still concludes that it is liable. Consequently, organisers need to do *more* to escape liability than only meeting the procedural requirements laid down in the Act.

The main contention of the Union, that the words “was not reasonably foreseeable” cause section 11(2)(b) to be internally inconsistent and irrational, thus rendering it constitutionally invalid, was rejected by both courts. The Supreme Court of Appeal’s

¹³⁵ *Garvis v SATAWU (Minister of Safety and Security, third party)* 2010 6 SA 280 (WCC) para 5.

¹³⁶ Para 6.

¹³⁷ The High Court does so in paras 12 to 17 in its judgment, while the Supreme Court of Appeal does so in paras 22 to 25 of its judgment.

¹³⁸ *South African Transport and Allied Workers Union v Garvas & Others* 2011 6 SA 382 (SCA) para 27.

reasoning in terms of this contention is quite important. The court invokes several “imaginary” scenarios, in which the convener could not and would not have reasonably foreseen certain circumstances and therefore would not be held liable.¹³⁹ But these scenarios are not a true reflection of all the possibilities of protest action. They only cover instances where the act causing the damage is not foreseeable, and not ones where the organisers foresee such an act or an omission and guard against it, but where the act or omission still occurs. The Union raised the argument that in many cases the conveners and police foresee the possibility of violence and that the convener would therefore be held liable if such violence occurs, irrespective of the measures it took to prevent it. The Supreme Court of Appeal reasoned that in such cases where violence is foreseeable and there are arguably no measures to prevent such violence, the gathering should not be continued.¹⁴⁰ Organisers who persist and go ahead would be liable.¹⁴¹ The “chilling effect” of section 11(2)(b) on section 17 was concluded to be unsubstantiated.¹⁴² The courts determined that the regularity of protest action contradicts allegations regarding this “chilling effect”. The chilling effect is on unlawful behaviour rather than the organisers who plan to exercise their right within the confines of section 17.¹⁴³ This conclusion is flawed. The courts are disconnected from the reality of protest action and those who participate in protest action. The rise in protest action is not because organisers do not foresee the possibility of liability. The time and effort which is required to organise protests is an indication that organisers foresee the possibility of liability and attempt to prevent it. However, even with the risk of liability as a deterrent, organisers continue because they view gatherings as an inherent part of democratic culture.¹⁴⁴

The High Court and the Supreme Court of Appeal’s main reason for determining that section 17 of the Constitution is not limited is because the right in section 17 only protects protests which are “peaceful”.¹⁴⁵ The courts reasoned that section 11 of the

¹³⁹ Paras 36-42.

¹⁴⁰ Para 43.

¹⁴¹ Para 43.

¹⁴² Para 50.

¹⁴³ Para 43.

¹⁴⁴ S Woolman “Freedom of Assembly” in S Woolman & M Bishop (eds) in *Constitutional Law of South Africa* 2 ed (OS 2007) 43-14.

¹⁴⁵ *South African Transport and Allied Workers Union v Garvas & Others* 2011 6 SA 382 (SCA) para 48; *Garvis v SATAWU (Minister of Safety and Security, third party)* 2010 6 SA 280 (WCC) para 29.

Act deals with gatherings which cause riot damage and therefore the liability imposed is in relation to violent or riotous gatherings.¹⁴⁶ The courts simply used the internal modifier “peaceful” to conclude that section 17 is not limited as the gathering which causes “riot damage” is not peaceful. This approach is problematic. Firstly, neither the High Court nor the Supreme Court of Appeal attempts to interpret what section 17 means by “peaceful”. The courts view the right to assemble as “an essential feature of democratic society”,¹⁴⁷ but do not analyse the right in order to determine the nature and scope of freedom of assembly in a constitutional democracy. No attempt is made to interpret “peaceful” in the South African context or in comparison with international instruments or foreign constitutions. When considering “the nature of the right” (in accordance with section 36 limitation analysis),¹⁴⁸ the High Court judge only states that the “right implicated is enshrined in s 17 of the Constitution. The right is afforded to organisations and/or trade unions to assembly, demonstrate, picket and petition”. Secondly, the courts accept that “riot damage” means damage caused by violent crowd action.¹⁴⁹ However, the definition of riot damage¹⁵⁰ does not refer to peace or violence. It simply refers to “any damage/loss” caused by the “holding of a gathering”. Therefore, if riot damage is given its meaning as the legislature has defined it, it is wide enough to include damage caused either by peaceful or violent gatherings.¹⁵¹ This has far reaching consequences for the exercise of section 17 rights.

¹⁴⁶ *South African Transport and Allied Workers Union v Garvas & Others* 2011 6 SA 382 (SCA) para 48 and 52; *Garvis v SATAWU (Minister of Safety and Security, third party)* 2010 6 SA 280 (WCC) para 29 and 51.

¹⁴⁷ *South African Transport and Allied Workers Union v Garvas & Others* 2011 6 SA 382 (SCA) para 47.

¹⁴⁸ *Garvis v SATAWU (Minister of Safety and Security, third party)* 2010 6 SA 280 (WCC) para 48. Judge Hlophe concluded that there had been no limitation of the right, but the court nevertheless engaged with section 36 to reinforce its opinion that “even if” there was a limitation, it would be in accordance with section 36 of the Constitution.

¹⁴⁹ *South African Transport and Allied Workers Union v Garvas & Others* 2011 6 SA 382 (SCA) para 52.

¹⁵⁰ The Regulation of Gatherings Act defines riot damage as:

“any loss suffered as a result of any injury to or the death of any person, or any damage to or destruction of any property, caused directly or indirectly by, and immediately before, during or after, the holding of a gathering.”

¹⁵¹ *SATAWU* para 134. In the minority judgment, Jafta J disagrees with the Supreme Court of Appeal regarding its interpretation of “riot damage”. Jafta J states that definitions included in legislation should be confined to the defined meaning.

The courts' conclusion regarding the limitation of the right to assembly is also noteworthy. The High Court and Supreme Court of Appeal both indicate that the limitation in terms of section 11(2) is a "small price to pay".¹⁵² This is disconcerting, particularly within the context of a limitation that could have a chilling effect on the exercise of a right that is fundamental to constitutional democracy. The courts' failure to analyse the nature and importance of the right firstly indicates that they under-appreciate the role of protest action and gatherings in South Africa's constitutional democracy. Secondly, it shows the courts' caution in the face of the destabilising effects protest action may have on the constitutional order.¹⁵³ Thirdly, the courts seem to be disconnected from the reality of the participants in gatherings,¹⁵⁴ as they do not inquire into the seriousness of the issues that give rise to the protest actions. The Supreme Court of Appeal does mention that "the reasons for the riot ought to be properly explored by the trial court in due course. This court has repeatedly warned that piecemeal litigation is not to be encouraged".¹⁵⁵ However, this would not qualify as piecemeal litigation as it is difficult to separate the reasons for protest from the protest itself. There is an inherent link between the purpose of protest action and the importance of the right itself. It is important for the court to be able to contextualise the protest action in order to determine if such a limitation truly is reasonable and justifiable. There is an inherent link between the urgency of the issues surrounding the purpose of the gathering, and the destabilising or disturbing nature of these gatherings. By not attempting to grapple with the realities which give rise to the protest, the court is in danger of making the section 36 limitations analysis far removed from the realities of those actually exercising the right.

3 4 3 Constitutional Court

The judgment of the Constitutional Court is an improvement on the lower courts' judgments regarding the analysis of section 17 of the Constitution. The judgment also provides a more comprehensive analysis of the Regulation of Gatherings Act and

¹⁵² *Garvis v SATAWU (Minister of Safety and Security, third party)* 2010 6 SA 280 (WCC) para 45; *South African Transport and Allied Workers Union v Garvas & Others* 2011 6 SA 382 (SCA) para 49.

¹⁵³ Woolman (2011) SAJHR 349.

¹⁵⁴ 352.

¹⁵⁵ *South African Transport and Allied Workers Union v Garvas* 2013 1 SA 83 (CC) para 45.

gives greater clarity regarding the importance of the fundamental right. However, the conclusions drawn by the Constitutional Court are still problematic.

The majority judgment firstly deals with the contention that the words “was not reasonably foreseeable” cause section 11(2)(b) to be internally inconsistent and irrational, thus rendering it constitutionally invalid. In sketching the background to section 11(2), the court finds that the intention of the legislature was to make the defence “deliberately tight” because the nature of protest calls for “extraordinary measures to curb potential harm”.¹⁵⁶ It is interesting to note that although the court mentions that this is an “unusual” defence,¹⁵⁷ it still concludes that it is rational to put the burden on the organiser to avoid liability. The objective of the legislature was that organisers should be aware of the possible harm and if such harm occurs, it “would be placed at their doorstep”.¹⁵⁸ The court emphasises that section 11(2)(a), (b) and (c) must be read together. Organisers should always be alive to the possibility of damage.¹⁵⁹ In every step organisers should be wary of the possibility and therefore take steps to avoid such damage. The process of determining if the reasonable steps were sufficient (in terms of section 11(2)(c)) to make the act “unforeseeable”, in terms of section 11(2)(b), might be “very exacting”.¹⁶⁰ The court concludes that the defence is “deliberately tight” and “very exacting”. It is therefore not enough to comply with the requirements of sections 3, 4 and 5 of the Act in relation to organising a gathering. The defence in section 11 requires that organisers do more. They must use their imagination to conjure up possibilities of damage at all times.¹⁶¹ Beyond this, they must put steps in place to prevent such possibilities. The scenarios used by the Supreme

¹⁵⁶ *South African Transport and Allied Workers Union v Garvas* 2013 1 SA 83 (CC) para 38.

¹⁵⁷ Para 38.

¹⁵⁸ *South African Transport and Allied Workers Union v Garvas* 2013 1 SA 83 (CC) para 38. In para 39 the court provides, from its perspective, the purpose behind section 11(2), namely:

“the purpose was (i) to provide for the statutory liability of organisations, so as to avoid the common law difficulties associated with proving the existence of a legal duty on the organisation to avoid harm; (ii) to afford the organiser a tighter defence, allowing it to rely on the absence of reasonable foreseeability and the taking of reasonable steps as a defence to the imposition of liability; and (iii) to place the onus on the defendant to prove this defence, instead of requiring the plaintiff to demonstrate the defendant’s wrongdoing and fault.”

¹⁵⁹ *South African Transport and Allied Workers Union v Garvas* 2013 1 SA 83 (CC) para 44.

¹⁶⁰ Para 44.

¹⁶¹ S Woolman “You Break it, You Own it: South African Assembly Jurisprudence after Garvis” (2015) 9 *Vienna J. on Int'l Const. L* 560-561.

Court of Appeal were also mentioned in the Constitutional Court judgment. The court used these examples to find that section 11(2) was not irrational. However, these scenarios (as discussed above) are quite unrealistic as a basis to decide whether the defence is rational in all cases. They do not deal with the intricacies of protest action and the various ways in which these numerous possibilities may occur. Although the court deals separately with the limitation of section 17, it is interesting to note that the court does not mention the section 17 right at all in paragraph 34 to 49 dealing with irrationality. The statute is so inherently linked to section 17 and to conclude that it meets the constitutional standard of rationality without reference to the nature of section 17 is questionable.¹⁶²

Unlike the High Court and the Supreme Court of Appeal, the Constitutional Court found that there was a limitation of section 17. Importantly, the court dealt with the internal modifier “peaceful”. It found that section 17 should be interpreted generously.¹⁶³ The right to assemble is only lost once the holders of the right show no intention of acting peacefully.¹⁶⁴ Therefore, participants and organisers who continue to exercise their right to assemble with a peaceful intent, will not lose such protection where there are isolated acts of unlawful behaviour.¹⁶⁵ The court then concluded that, based on the definition of “riot damage”, even those gathered with a peaceful intent would be liable under the act where there has been damage.¹⁶⁶ This is a significant limitation on the right to freedom of assembly. Considering the statements made by the court regarding the broad interpretation that should be afforded to the internal modifier of peaceful, this limitation is quite severe. It is difficult to reconcile the court’s broad interpretation regarding the internal modifier of “peaceful” in the text of section 17 of the Constitution and its conclusion that the section 11 limitation of the Act can result in liability for the organisers, particularly where their overall intent is peaceful. So therefore, even where organisers protest “peacefully and unarmed”, they are still held liable for damages resulting from isolated acts of unlawful behaviour.

The court also accepted that section 11 causes a significant increase in the cost of organising a gathering and that many people or poorly resourced organisations may

¹⁶² Woolman (2015) *Vienna J. on Int'l Const. L* 560-562.

¹⁶³ *South African Transport and Allied Workers Union v Garvas* 2013 1 SA 83 (CC) para 53.

¹⁶⁴ Para 53.

¹⁶⁵ Para 53.

¹⁶⁶ Para 56.

therefore be greatly limited in organising gatherings and exercising their section 17 rights.¹⁶⁷ The mere possibility of harm caused by a minority in the group limits the rights of a vast number of participants through the possibility of liability in terms of section 11(2).¹⁶⁸ The court recognised that this also amounted to a limitation of section 17.

In its analysis of the nature and importance of the right (in terms of the section 36 limitation analysis) the court continued with its “generous” interpretation. The court emphasised the importance of the right and stated that “the right to freedom of assembly is central to our constitutional democracy. It exists primarily to give a voice to the powerless”.¹⁶⁹ This seems to suggest that groups with no power *need* this right to participate in a democracy. The court continued by stating that “this right will, in many cases, be the *only* mechanism available to them to express their legitimate concerns”.¹⁷⁰ If this is the only mechanism available, then a limitation of this right would be very serious indeed in circumstances where these groups have no other viable mechanisms to participate. The court also linked the right to assemble to the exercise of other rights. It stated that “in assessing the nature and importance of the right, we cannot therefore ignore its foundational relevance to the exercise and achievement of all other rights”.¹⁷¹ However, the court did not explore these other rights, or analyse the values which underlie freedom of assembly. Specifically, in the case at hand, the link between freedom of assembly, labour rights and socio-economic rights was not analysed at all. Despite this, the Court’s discussion of the importance of the right seems to place freedom of assembly in a fundamental position in our constitutional democracy. The court recognises that there may be a limitation on its exercise, but such limitation must not be “without good reason”.¹⁷² The purpose sought to be achieved through the limitation must be sufficiently important to warrant the limitation.

The purpose of the current limitation(s) is to “protect members of society, including those who do not have the resources or capability to identify and pursue the

¹⁶⁷ Para 57.

¹⁶⁸ Para 58.

¹⁶⁹ Para 58.

¹⁷⁰ Para 58 (emphasis added).

¹⁷¹ Para 61.

¹⁷² Para 66.

perpetrators of the riot damage for which they seek compensation”.¹⁷³ The purpose is to protect the “physical integrity, the lives and sources of livelihood” of the “vulnerable”.¹⁷⁴ This purpose is important. However, the conclusion of the court regarding such importance is problematic for several reasons. Firstly, the court makes reference to the “organisation” which organises the protest. Although, in the case at hand South African Transport and Allied Workers Union was a large trade union, there are many cases where those who organise do not have such resources as established organisations. The court creates the impression that it is the vulnerable individual who must be protected by the large organisation. However, the organisers of protest action are often individuals or organisations with no resources or power. Secondly, the court emphasises the importance of protecting the livelihood of the vulnerable. However, the participants and organisers of gatherings are themselves often vulnerable.

The court also states, in view of the importance of the purpose of the limitation, that the “organization *always* has a *choice* between exercising the right to assemble and cancelling the gathering in the light of the reasonably foreseeable damage”.¹⁷⁵ This is difficult to square with the statement that protests may be the only mechanism for participants to exercise their rights. A decision not to exercise the right to assemble as a result of the fear that the organisers may incur liability for any damages arising from the protest, may therefore place a significant restriction on the ability of vulnerable groups to enforce their rights. Often, these rights may be closely connected with their own livelihood, as is the case with labour rights and socio-economic rights.

The problematic nature of the *choice* between exercising the right to assemble and cancelling the gathering is also evident from the court’s analysis of the nature and extent of the limitation. The court states that “potentially, the exercise of the right also occasions deterrent consequences. One of them is the presumption of liability for riot damage, which can be traced back to the organization’s *decision* to exercise the right to assemble”.¹⁷⁶ The court finds that although this is a chilling effect, it does not deny the right to freedom of assembly.¹⁷⁷ This is debatable, as the deterrent effect of extensive liability could effectively amount to a denial of this right.

¹⁷³ Para 67.

¹⁷⁴ Para 67.

¹⁷⁵ Para 68 (emphasis added).

¹⁷⁶ Para 69 (emphasis added).

¹⁷⁷ *South African Transport and Allied Workers Union v Garvas* 2013 1 SA 83 (CC) para 69.

The Constitutional Court judgment is an improvement on the High Court and Supreme Court of Appeal judgments. The court gives section 17 a more generous interpretation and places greater emphasis on the nature of the right and its importance. And yet, the judgment is problematic, as it assumes that the organisers of gatherings are well-resourced organisations, underplays the invasive nature of the limitation, and underestimates its chilling effect on the right to assemble. This judgment is indicative of a very restrictive view of freedom of assembly within a constitutional democracy. The court seems to sidestep the important inquiry into the everyday reality of protest action in South Africa and how the *chilling effect* has a vast impact on the voices of millions of South Africans. The judiciary examines the meaning and importance of assembly in the Act by focussing on the legislative intent.¹⁷⁸ This is surprising considering that the Act was promulgated before the introduction of the Final Constitution.

While there are various aspects in this series of judgments which are problematic, the recent case of *Mlungwana* and the pending Constitutional Court judgment may provide a significant development. The recent High Court judgment of *Mlungwana* specifically dealt with the harsh consequences of criminal sanctions in section 12(1)(a) and its unconstitutionality.

3 5 Criminal Liability in terms of the Regulation of Gatherings Act: *S v Mlungwana*

3 5 1 The facts, section 3 and section 12(1)(a) of the Regulation of Gatherings Act

The appellants were convicted in the Cape Town Magistrates Court of contravening section 12(1)(a) of the Regulation of Gatherings Act.¹⁷⁹ Section 12 provides as follows:

Offences and penalties

(1) Any person who-

- (a) convenes a gathering in respect of which **no notice or no adequate notice** was given in accordance with the provisions of section 3;

shall be **guilty of an offence** and on conviction liable-

- (i) in the case of a contravention referred to in paragraphs (a) to (j), to a fine or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment; and

¹⁷⁸ See specifically where the court focuses on the intention of the legislature to make the defence “deliberately tight” because the nature of protest calls for “extraordinary measures to curb potential harm” in para 38 of *South African Transport and Allied Workers Union v Garvas* 2013 1 SA 83 (CC).

¹⁷⁹ *S v Mlungwana* 2018 1 SACR 538 (WCC) para 3-5 and para 12.

- (ii) in the case of a contravention referred to in paragraph (k), to a fine or to imprisonment for a period not exceeding three years.

The appellants organised a demonstration.¹⁸⁰ They specifically intended the number of the participants to be under the threshold of 15 to ensure that it would qualify as a demonstration.¹⁸¹ They would therefore not have to provide notice to the municipality, as required by section 3 of the Regulation of Gatherings Act. However, the appellants were aware that there was a risk that the demonstration may evolve to a gathering where a greater number of people would participate.¹⁸² The protest occurred on 11 September 2013. While it began with 15 participants, others joined and it did eventually go beyond the number of 15 people.¹⁸³ The protest was peaceful and non-armed.¹⁸⁴

As highlighted above, the Regulation of Gatherings Act requires notification of a gathering to the local authority.¹⁸⁵ These notification requirements are burdensome, but are exacerbated when coupled with a potential criminal conviction. The appellants challenged the *criminalisation* of a person who convenes a gathering without giving notice.¹⁸⁶ They accepted that the notice requirement served a legitimate purpose, but argued that the criminalisation of a failure to do so deterred people from gathering.¹⁸⁷

The following section will briefly discuss the finding of the High Court and provide a similarly brief comment on the pending Constitutional Court case, based on supporting documentation of the various parties.

¹⁸⁰ The appellants are members of the Social Justice Coalition. The demonstration was directed at the Mayor of the City of Cape Town and was a demonstration which dealt with service delivery and specifically sanitation facilities. See *S v Mlungwana* 2018 1 SACR 538 (WCC) para 8.

¹⁸¹ Para 22 of M Bishop "Appellants Heads of Argument" in *S v Mlungwana* 2018 1 SACR 538 (WCC) and para 16 and 17 of M Bishop "Applicants Heads of Argument" in *Mlungwana and Others v S and Another* CCT32/18.

¹⁸² Para 22-23 of M Bishop "Appellants Heads of Argument" in *S v Mlungwana* 2018 1 SACR 538 (WCC) and para 16-17 of M Bishop "Applicants Heads of Argument" in *Mlungwana and Others v S and Another* CCT32/18.

¹⁸³ Para 10-11.

¹⁸⁴ Para 11.

¹⁸⁵ See above part 3 3 2 Section 3, 4, 5 and 6. See also *S v Mlungwana* 2018 1 SACR 538 (WCC) para 22-28.

¹⁸⁶ *S v Mlungwana* 2018 1 SACR 538 (WCC) para 20.

¹⁸⁷ Para 20.

3 5 2 *The (un)constitutionality of section 12(1)(a)*

The High Court declared section 12(1)(a) of the Regulation of Gatherings Act unconstitutional. It found that the “effect of the section 12(1)(a) sanctions appears to be quite chilling. This is so because of the well-known calamitous effects of a previous conviction recorded against an individual”.¹⁸⁸ After finding that section 17 of the Constitution was limited, the court then continued to determine whether the limitation was justifiable in terms of section 36 of the Constitution.

In analysing the justification of this limitation the court found that, although the nature and importance of the right cannot be overemphasised, the limitation did in fact serve a legitimate government purpose in that the exercise of the right must be done with “due regard to the rights of others”.¹⁸⁹ In this regard, it referred to various submissions made by the State. The State submitted that the deterrence of non-notified gatherings – through criminalisation – serves a legitimate government purpose “in that there is a greater risk in non-notified gatherings not being peaceful and unarmed and thereby infringing the s 17 right that vests in all persons”.¹⁹⁰ Additionally, the State submitted that the notification requirement provides the police and the local authority with the opportunity to organise and plan in order to protect the safety and order of society.¹⁹¹ The court however found that the nature and extent of the limitation was to chill free speech.¹⁹² The court held that “the effect of the limitation therefore is not only to punish the conveners for failing to serve a notice; it is also to deter people from exercising their right to free assembly”.¹⁹³ In making this finding, the court made reference to submissions made by the applicant and submissions made by amici curiae.¹⁹⁴ These submissions focussed on the importance of the right to assemble in the international law context. Furthermore, it was submitted that failure to notify, in itself, should not result in sanctions. This is especially true where the failure to notify

¹⁸⁸ Para 42.

¹⁸⁹ Para 55.

¹⁹⁰ Para 50.

¹⁹¹ Para 51- 52.

¹⁹² Para 84.

¹⁹³ Para 84.

¹⁹⁴ The first amicus (Open Society Justice Initiative) and the second amicus (United Nations Special Rapporteur on the Right to Freedom of Peaceful Assembly and Association) made specific reference to various International law instruments. See para 60- 74 of *S v Mlungwana* 2018 1 SACR 538 (WCC).

does not result in harm or disruption where there is no violence.¹⁹⁵ The court therefore found that there is a legitimate governmental purpose served by a notice requirement, as it helps enable the government to fulfil its positive obligations, but that a criminal sanction for non-notified gatherings does not serve a legitimate governmental purpose.

The court made the following comment with regard to the collective nature of protest action and the importance of protest in relation to the exercise of other rights:

“Ms Mlungwana's evidence establishes that the Khayelitsha community had for several years bemoaned and decried the state of ablution facilities without getting a satisfactory response from the City of Cape Town. According to her evidence, the current facilities have resulted in opportunistic criminal elements taking advantage of those using the outside toilets, more especially during the night. The gathering which forms the subject-matter of this appeal was organised to draw attention to their plight. It appears from the charge-sheet that most of the appellants (also the conveners) are residents of Khayelitsha. From the foregoing it is easy to discern that, central to the people's exercise of the s 17 rights, the call to mobilise and organise a demonstration is pivotal. It can be accepted that those who make the clarion call for people to come together in order to demonstrate their dissatisfaction must, in addition to being members of the SJC, be leaders in their communities, otherwise they would not, in my view, have the clout to make the call. Bearing in mind that the right of assembly enables people to access their other constitutional rights, the role played by the conveners cannot be overemphasised.”¹⁹⁶

From the above, it is clear that the court considered the context of the case. The court highlighted the relationship between the Government (City of Cape Town) and society (Khayelitsha community). Moreover, the court highlighted the role of protest in enforcing and protecting other human rights. Accordingly, the court found that section 12(1)(a) violated section 17 of the Constitution and that such a limitation was not reasonable in an open and democratic society based on the values of freedom, dignity and equality.¹⁹⁷

¹⁹⁵ See Para 70 and 83-84 23 of M Bishop “Appellants Heads of Argument” in *S v Mlungwana* 2018 1 SACR 538 (WCC)

¹⁹⁶ *S v Mlungwana* 2018 1 SACR 538 (WCC) para 92.

¹⁹⁷ Para 94. The court also provided that those who will most likely be affected by this criminalising section are those who are already in a particularly weaker position. See para 92 where the court states “Furthermore, it cannot be seriously contested that, in the context of South African society, those most likely to fall foul of s 12(1)(a) are the very communities previously disadvantaged as they, to a certain extent, remain the voiceless.”

Mlungwana is an important judgment as it firstly provides a useful analysis of the notice requirements of the Regulation of Gatherings Act. Furthermore, it confirms that protest action is a vitally important part of South Africa's democratic dialogue and that any limitation must be legitimate and justified. The matter has been taken on appeal to the Constitutional Court. As of yet, the Constitutional Court has not handed down judgment. The hearing date was 21 August 2018.

3 5 3 *The nature of criminal liability*,¹⁹⁸ *the State and protest action*

3 5 3 1 *SATAWU and Mlungwana: Criminal and Civil Liability*

An important distinction must be drawn between *SATAWU* and *Mlungwana*. While in *SATAWU*, the focus was on *civil liability* of conveners and recourse for those who suffered actual loss/damage, the *Mlungwana* matter specifically deals with *criminal liability* where no notice is given. The distinction between civil and criminal liability is an important one. The *SATAWU* civil sanction was for actual harm (such as "riot damage"). In *Mlungwana* it is about a criminal sanction for *potential* harm irrespective of whether any harm had occurred or not. Furthermore, irrespective of whether the conduct of the gathering is in line with the Act – and whether such conduct is peaceful and unarmed as required by the Constitution – criminal liability may still follow for those who organise such a gathering.

As recognised in the judgment, criminal liability is a harsh consequence that may come "with the loss of liberty, and the effect of a previous conviction impacts very negatively on one's future employment, travel, or study prospects".¹⁹⁹ The court also found that criminal conviction leaves "an indelible mark" on the appellants, "hampering almost every aspect of their lives".²⁰⁰ Given the severe consequences of a criminal conviction, the Legislature will only criminalise conduct in specific circumstances. Beyond the obstacles imposed on organising a protest, the additional hurdle of a potential criminal liability places protest action, which may be peacefully exercised, squarely outside the bounds of a legitimate exercise of democratic participation. It is

¹⁹⁸ It must be noted that section 12(1)(a) is not the only section in the Regulation of Gatherings Act which gives rise to a possible criminal sanction. See particularly section 12(1)(a)-(e).

¹⁹⁹ Par 80.

²⁰⁰ Para 92.

therefore clear that the legislature views the organisers of and participants in protest action as potential criminals rather than citizens exercising their constitutional rights.

Notably, *SATAWU* concerned a dispute that arose between private parties. *Mlungwana*, by contrast, is a criminal case, which deals with the specific power relationship and dynamic between the State and individuals. The respondents in the Constitutional Court case are the State (as first respondent) and the Minister of Police (as second respondent).²⁰¹ The arguments put forward by the State in supporting the constitutionality of section 12(1)(a) provide a useful perspective on how the State views protest action. A few important points raised by the State in their heads of argument must be analysed and commented on.

3 5 3 2 Heads of Argument of the State and perspective on protests

The State's argument before the Constitutional Court can be summarised with reference to a few excerpts from the Heads of Argument. Firstly, their argument is based on a few separate and interlocking contentions:

"(a) the giving of notice serves a legitimate government objective of ensuring that *proper planning* may occur so as to ultimately facilitate the exercise of the right protected by section 17 of the Constitution; (b) the giving of notice imposes *modest requirements* on the person(s) convening a gathering; and (c) the law provides as a defence to such a charge, that the gathering concerned took place spontaneously."²⁰² (emphasis added)

Furthermore, an important point put forward by the Minister is that

"criminalising the conduct of a convenor who fails to give notice serves as a *deterrent* to the convening of un-notified gatherings, which bear a *higher risk of not being peaceful*; facilitates the *proper allocation of scarce police resources* and in so doing, ultimately serves to give effect to the rights protected by section 17 of the Constitution."²⁰³ (emphasis added)

It is clear from these statements that the State embraces a specific understanding of protest action. It is focussed primarily on the potential danger that protests present

²⁰¹ Para 1 of K Pillay and M Mokhoaetsi "Heads of Argument on behalf of the First and Second Respondent" in *Mlungwana v S and the Minister of Police* CCT 32/18.

²⁰² Para 3 of K Pillay and M Mokhoaetsi "Heads of Argument on behalf of the First and Second Respondent" in *Mlungwana v S and the Minister of Police* CCT 32/18.

²⁰³ Para 3.

to the State. The State does not provide a basis for its contention that un-notified gatherings bear a greater risk, and balloons the potential risk rather than focusing on the importance of the right itself. Protest action is seen as a hindrance which should be controlled. Notably, the State, in its Heads of Argument, does not focus on the importance of freedom of assembly in a democratic society, or the consequences of criminalisation. Central to their enquiry is not the citizens who exercise the right, but the ability of the police to exercise their powers and the allocation of sources.

The State's restrictive view on protest action is typified by its response to the Applicants' contention that the notice requirement, in practice, is in fact an application process rather than a notice requirement.²⁰⁴ It submits that

"it is clear that the Gatherings Act contemplates a notice procedure. If there is a complaint that that process as applied in practice is too onerous or that it amounts to more than what the legislation prescribes, we submit that the Applicants' complaint lies elsewhere."²⁰⁵

This response demonstrates the Executive's lack of concern for the practical problems experienced by the organisers of protests, and for the capacity of criminalisation to deter the exercise of freedom of assembly. In the State's view, the perceived threat of protest action justifies criminal sanction even where the protest may turn out to be peaceful and unarmed.²⁰⁶ The act of not notifying is enough to label an organiser a criminal because of the potential risk. The State does not even investigate the balance between the consequence of criminal sanction and the importance of the exercise of the right.

3 6 Conclusion

While it is evident that freedom of assembly has an important role to play in South Africa's constitutional democracy, the ideal of section 17 of the Constitution and the reality of the regulation of protests in South Africa are far removed from each other. The Regulation of Gatherings Act is problematic, and so is its enforcement by local authorities and the police and its interpretation by the courts.

²⁰⁴ See above part 3 3 2.

²⁰⁵ Para 46.1 of K Pillay and M Mokhoaetsi "Heads of Argument on behalf of the First and Second Respondent" in *Mlungwana v S and the Minister of Police* CCT 32/18.

²⁰⁶ Para 53 of *S v Mlungwana* 2018 1 SACR 538 (WCC).

The legislative framework seems out of touch with the centrality of protests to democratic contestation in South Africa. The distinction made between demonstrations and gatherings is problematic; and the requirements relating to notification are onerous. Legislative provisions relating to the liability of the organisers of gatherings also have serious implications for the right to assemble. Furthermore, local authorities and police often act in an arbitrary manner and use the powers bestowed on them to deny the exercise of the right. *SATAWU* seems to illustrate that the judiciary also tends to take a restrictive view of freedom of assembly. Despite emphasising the importance of protests in a democracy, the courts seem to distance themselves from the disruptive potential of protests in creating spaces for participation outside the normal institutional forums.

Protests exist at the periphery of democratic thought and participation. Freedom of assembly, viewed through the lens of constitutional values like freedom and equality, should allow for contestation and plurality. It should not allow the police and executive authority to repress these spaces of disruption and contestation. While the *Mlungwana* judgment does provide an important improvement on *SATAWU* in the broader context of section 17, it also paints a picture of a State which has a very restrictive view of protest action. Here the State uses the procedural requirement of notification as a basis for control through the deterrent of potential criminal liability. The Executive seems to view protests as a hindrance which requires police control and management rather than as an important vehicle for democratic participation. Assemblies and demonstrations should allow for a democratic space controlled and prompted by those participating or organising (such as conveners). The importance of these conveners should not be understated, as they help to provide a space for the citizenry to participate in democratic dialogue. The criminalisation of their actions has severe consequences for the ideal of an active and engaged citizenry.

There is a tension between state authority and protests, but this tension should be viewed as an inherent part of democracy. In a country with substantial economic and political inequality, contestation should be recognised as an important part of democratic participation rather than as a hindrance to the police, local government or the rule of law.

Chapter 4

4 Freedom of assembly: direct and representative democracy

4 1 Introduction

This chapter and the next one seek to understand how understandings of freedom of assembly are informed by different models of democracy. Two broad understandings of democracy will be highlighted in this chapter, namely direct democracy and representative democracy.¹ These models are often contrasted to one another.

The chapter starts with a brief discussion of the meaning of democracy, both generally and within the South African context. It then distinguishes between direct and representative democracy. The two models are discussed separately: in both cases, a brief historical context is provided, and their specific characteristics are identified. The *link* between freedom of assembly and these forms of democracy is examined, with reference to academic literature. The question is posed whether and to what extent these understandings of democracy enable an adequate understanding of freedom of assembly in the South African context.

It must be noted that there are various conceptions of democracy which are often identified with, or used to supplement, the broad notions of representative and direct democracy.² These include ideas such as participatory, deliberative and agonistic democracy. These conceptions of democracy are not discussed in this chapter, but will be examined in chapter five. The present chapter therefore examines representative democracy through the lens of more conventional interpretations, which typically understand it in fairly restrictive or formalistic terms. It further juxtaposes this conception with the so-called “pure” form of democracy, namely direct democracy.

¹ T Roux “Democracy” in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (RS 6 2013) 10-2.

² D Held *Models of democracy* 3rd ed (2006) 4.

4 2 Democracy and South Africa

Democracy is commonly defined as “a form of government in which, in contradistinction to monarchies and aristocracies, the people rule”.³ While there have been various attempts to define democracy, central to these definitions is the ideal that “the people rule”. The original Greek word *demokratia* literally means rule (*kratos*) by the people (*demos*).⁴ However, there is disagreement about what exactly it means to say that the people rule, and how this is to be achieved. As a result, the term democracy has come to be qualified by a variety of adjectives, each of which signifies a particular model, conception or form of democracy.⁵ All concepts of democracy place the people at the centre of this form of government. Democracy is sometimes also described as a “political ideal” whereby decisions are binding on members of a society (or community) through the process of collective decision making.⁶ The manner in which the people exercise their sovereign power is an important key to the various understandings of democracy.

Held further points out that democracy “entails a political community in which there is some form of political equality among the people”.⁷ To a certain extent, this ideal is defined by the phrase “one person, one vote”.⁸ This phrase was central to the revolutionary politics of the African National Congress and the anti-apartheid struggle.⁹ It was used to describe a government which would be truly representative of the people on the basis of political equality among all citizens. That would be in sharp contrast to the system of government under apartheid, where the majority of the people were excluded from the voting process and where, as a result, the

³ Held *Models of democracy* 1.

⁴ Held *Models of democracy* 1.

⁵ Roux “Democracy” in *CLOSA* 10-1. Roux describes democracy as “a noun permanently in search of a qualifying adjective.”

⁶ J Cohen & C Sabel “Directly-Deliberative Polyarchy” (1997) 3 *European Law Journal* 317.

⁷ Held *Models of democracy* 1. See further R Dahl *On Democracy* (1998) 36. Dahl provides certain criteria to determine whether there is political equality and consequently whether there can be said to be a democracy. These are effective participation, voting equality, enlightened understanding, control of the agenda and the inclusion of adults.

⁸ D Moseneke “Striking a balance between the will of the people and the supremacy of the Constitution” (2012) 129 *SALJ* 10.

⁹ The Freedom Charter adopted at the Congress of the People, Kliptown 1955.

governmental system was not truly representative of “the people”.¹⁰ The exclusion of black people from citizenship and the rights associated with it, was further cemented by the system of parliamentary sovereignty, which made it impossible to challenge the validity of duly adopted Acts of Parliament that were discriminatory or oppressive.¹¹ For these reasons, those excluded from participation in government institutions resorted mainly to extra-institutional forms of politics, which included protest action, in their struggle for a representative government based on the principle of one person, one vote.

Section 1 of the South African Constitution states that the “Republic of South Africa is one, sovereign, democratic state”. The preamble to the Constitution also makes it clear that the Constitution envisages “a democratic and open society in which government is based on the will of the people”.¹² The Constitution uses a variety of adjectives to qualify democracy, such as representative,¹³ participatory,¹⁴

¹⁰ The attempt to include some of the population groups that were previously excluded from the vote through the Republic of South Africa Constitution Act 110 of 1983 did not fulfil the requirement of political equality. The tricameral parliament established in terms of the Constitution created three houses of Parliament: The House of Delegates (for Indians), the House of Representatives (for Coloureds) and the House of Assembly (for Whites). This parliament was a charade. The political power remained vested in the House of Assembly which represented only white citizens. See J Dugard “Racism and Repression in South Africa: The Two Faces of Apartheid” (1989) 2 *Harvard Human Rights Law Journal* 97-9.

¹¹ The link between parliamentary sovereignty and apartheid laws and policies can be illustrated with reference to the disenfranchisement of coloured voters. Parliament’s early efforts to circumvent the entrenchment of the coloured vote in the South Africa Act of 1909 were frustrated by two successful constitutional challenges. In *Harris & others v Minister of the Interior & another* 1952 2 SA 428 (A), the Appellate Division declared the Separate Representation of Voters Act 46 of 1951 invalid, on the ground that Parliament had not complied with the prescribed constitutional procedure. In *Minister of the Interior v Harris* 1952 4 SA 769 (A), the High Court of Parliament Act 35 of 1952, which allowed Parliament itself to set aside decisions of the Appellate Division, was also declared invalid. However, Parliament overcame these challenges after it expanded the Senate and Appellate Division. It then amended the South Africa Act, this time with the required two-thirds majority in a joint sitting of both Houses of Parliament. A challenge to the validity of the amendment failed in *Collins v Minister of the Interior & another* 1957 1 SA 552 (A).

¹² See Moseneke “Striking a balance between the will of the people and the supremacy of the Constitution” (2012) *SALJ* 12.

¹³ Ss 57(1)(b), 70(1)(b), 116(1)(b) of the Constitution.

¹⁴ Ss 57(1)(b), 70(1)(b), 116(1)(b) of the Constitution.

constitutional¹⁵ and multi-party.¹⁶ The Constitution therefore envisions a type of democracy which combines these different dimensions of democracy. Beyond these descriptive indicators and a description of democracy as a system of government,¹⁷ democracy is also described as a form of society,¹⁸ a principle,¹⁹ a set of values,²⁰ and a culture.²¹ The goal of these references to democracy is to ensure that “the people” as a collective are central to the system of government in various ways, which cannot necessarily be captured in terms of a single model of democracy.

South Africa’s democracy must be understood with reference to the preamble which begins with the words, “*We, the people*”. In another reference to the people, the preamble states that “*We therefore, through our freely elected representatives, adopt this Constitution*”. Despite the introduction of representatives into our democracy, the *people* remain central. The position of the people in South Africa’s democracy can be explained with reference to direct and representative models of democracy. Both these models emphasise the central place of the people, but the way this is done is quite different.

4 3 Freedom of assembly and direct democracy

It is quite rare in modern democracies to have any type of direct democracy.²² Many academics accept that the modern conception of democracy possibly has elements of direct democracy. The Constitution does make provision for referendums,²³ which is a form of direct democracy, but this mechanism has not been used since the dawn of democracy in South Africa, and seems unlikely to be used any time soon. Some academics are of the view that freedom of assembly institutes a modern form of direct democracy.²⁴ However, they generally provide little or no

¹⁵ S 181(1) of the Constitution.

¹⁶ S 236 of the Constitution.

¹⁷ Ss 1(d), 152(1)(a) of the Constitution.

¹⁸ The preamble and ss 36(1), 39(1) (a), 59(2), 72(2), 118(2) of the Constitution.

¹⁹ S 195(1) of the Constitution.

²⁰ The preamble and ss 7(1), 195(1) of the Constitution.

²¹ S 234 of the Constitution.

²² Roux “Democracy” in *CLOSA* 10-4.

²³ Ss 84(2)(g) and 127 of the Constitution.

²⁴ Roux “Democracy” in *CLOSA* 10-1-10-4 and 10-8; S Woolman & J Swanepoel “Constitutional History” in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (OS 2008) 2-1-2-5.

backup for this statement. Before challenging the idea of freedom of assembly as direct democracy, it is useful to provide a basic overview of direct democracy.

4.3.1 Direct democracy²⁵

Roux describes direct democracy as “a system of government in which major decisions are taken by the members of the political community themselves, without mediation by elected representatives”.²⁶ It is regarded as the oldest form of democracy. In the city-state of Athens in the fifth century BC, the form of government was based on “self-government”, where the people held the sovereign power to make legislative and judicial decisions.²⁷ Held refers to this model as “classical democracy”.²⁸ This ancient form of democracy highlighted the equality and liberty of the citizens of the city-state (polis).²⁹ The centrality of the people was based not only on the idea that the people should have the right to participate and make decisions, but on the understanding that it was a social good for the people to participate. It was a citizen’s duty to participate in this form of government. This was not seen as a violation of the citizen’s freedom but as a reinforcement of his liberty.³⁰ In many respects, the ideal of the direct rule of the people represents a “pure” form of democracy. However, it was only made possible by limiting who qualified as citizens³¹ and by virtue of the fact that the community of the city-state was small enough for decisions to be made directly by those citizens.

While this form of democracy did not endure, these ideas were revived in the sixteenth century in the city republics of Italy.³² An important figure of this time was

See further I Currie & J de Waal *The Bill of Rights Handbook* 6 ed (2013) 16; I Currie and J De Waal *The new constitutional and administrative law volume 1: constitutional law* (2001) 88-89;

²⁵ This section touches only very briefly on different theoretical contributions to the idea of direct democracy. For a fuller analysis see Held *Models of democracy* 11-27 and 96 - 124.

²⁶ Roux “Democracy” in *CLOSA* 10-1-10-4.

²⁷ Held *Models of democracy* 45.

²⁸ 11.

²⁹ 13. Only Athenian men over the age of 20 qualified for citizenship. See Held *Models of democracy* 19.

³⁰ Held *Models of democracy* 13-16.

³¹ Those who qualified as citizens were Athenian men over the age of 20. Therefore, Athenian democracy excluded women, immigrants, and a large slave population. See Held *Models of democracy* 19.

³² Roux “Democracy” in *CLOSA* 10- 5. See further Held *Models of democracy* 40-43.

Niccolò Machiavelli. Machiavelli was a proponent of a form of democracy which Held describes as protective republicanism.³³ This was closely related to the Athenian form of classical democracy and highlighted the need for political participation to ensure personal liberty. The basis of the citizenry ruling themselves is to ensure that they cannot be dominated by other powers.³⁴ Direct participation ensured that the citizenry could protect their liberty in their interaction with other citizens in assemblies. This would lead to individual (“egoistic”) concerns being subordinate to the collective public good.³⁵ Another advocate of a more direct democratic form of government was the eighteenth-century French political philosopher Jean-Jacques Rousseau. Rousseau advocated a system of government which he referred to as “republican” and which Held refers to as developmental republicanism.³⁶ Rousseau reaffirmed the notion of active citizenship and self-rule. He posited that in an ideal political system, individuals should participate directly in legislative functions. Rousseau attempted to reintroduce ideas of citizen assemblies which would allow citizens to come together as a community and generally decide for the communal good – based on this, they would produce laws appropriately. Central to Rousseau’s thought was the ideal of the sovereignty of the people. The people are sovereign and therefore, the dividing line between state and civil society must be reshaped, as self-rule creates a new type of society.³⁷ Self-government, and decisions based on the will of the citizenry, is an end in itself.³⁸ There is no distinction between the state and the civil society (the community of people).

Karl Marx and Friedrich Engels were also important contributors to the idea of direct democracy. Their ideas were shaped through their understanding of a capitalist market economy in which relations between individuals are determined by class structures.³⁹ They emphatically made the point that liberal democracy (as discussed below under section 4 5 1) and the free market economy did not support the ideals of equality,

³³ Held *Models of democracy* 40.

³⁴ 44.

³⁵ 43.

³⁶ 35.

³⁷ 43.

³⁸ 45.

³⁹ 96-100.

security of the person and liberty.⁴⁰ This was because the capitalist system created and reinforced class divisions and because the protection of property rights – and the control of the private bodies of the means of production – resulted in the exploitation of the working class. For Marx, a true democracy would see the eventual eradication of the state or “the end of politics”⁴¹ where all class structures are eradicated.

A key aspect for Marx was “accountability”. The form of direct democracy that he advocated rejected the structure of separation of powers that is typical of representative democracies, and instead favoured regular elections where all structures were accountable to the people (working class).⁴² These elections would not function like those in a representative democracy. The elections were to appoint administrators who would be mandated to communicate the demands of the people. If they failed to accurately depict these demands (in all issues and at all times), they would immediately be recalled.⁴³ This was to ensure that all decisions in government were the precise decisions of the people. Those appointed did not have discretionary powers to depart from the decisions mandated to them. Marx required the people not only to be constantly involved in the decision making process, but also to make all decisions. Similar to Rousseau, the decisions made should depict the will of the people, and those who were appointed to communicate these decisions did not have the power to deviate from their specific mandate.

Direct democracy requires decision making by the citizens. The different authors referred to above structured the manner in which the citizens would make decisions differently, but nevertheless agreed that eventually the decisions made by legislative, executive or judicial functionaries would be indistinguishable from the will of the citizenry. Even where “representatives” make decisions, they must be approved by the people so that all decisions are in fact the decisions of the people. Rousseau famously wrote:

“Sovereignty cannot be represented, for the same reason that it cannot be alienated; its essence is the general will, and will cannot be represented — either it is the general will or

⁴⁰ 103-106.

⁴¹ 106. Held refers to this idea as the end of the state and the transformation of society. See specifically K Marx & F Engels *The Communist Manifesto* (1848) 127. Marx regarded political power as “merely organised power of one class oppressing another”.

⁴² Held *Models of democracy* 100.

⁴³ 100-103.

it is something else; there is no intermediate possibility. Thus the people's deputies are not, and could not be, its representatives; they are merely its agents; and they cannot decide anything finally. Any law which the people has not ratified in person is void; it is not law at all."⁴⁴

Direct democracy and representative democracy are in contradistinction to one another. Although modern democracies may contain elements of direct democracy within a representative system, advocates for direct democracy recognise the inherent tension between representative and direct democracy. As shown in the above quote of Rousseau, proponents of direct democracy are of the view that the sovereignty of the people is either expressed through direct participation (or direct decision making) or is extinguished through an attempt to represent it. If democracy concerns itself with the authority to make collective decisions, then the distinction between direct and representative democracy is not only on the level of participation of the electorate. The difference also lies in the type of decision being made. When people vote in a representative democracy, they decide *who* (which representatives) will make decisions of substance on their behalf. In a direct democracy, the people themselves make decisions of substance.⁴⁵

Direct democracy requires an active citizenry. It requires the direct participation of the people on a regular basis. The citizenry must actively involve itself in the state as the state and the citizenry are the same. An active citizen, from this perspective, is an individual whose very being is affirmed in and through political action. In this sense, to be involved in the system of government is a social good. It places a duty on citizens to be involved in their community.⁴⁶ This is not necessarily seen as a restriction of liberty, as political participation represents the highest form of freedom and secures individual liberties.

⁴⁴ J Rousseau *The Social Contract* (1762) 141 as quoted in Held *Models of democracy* 46.

⁴⁵ Cohen & Sabel "Directly-Deliberative Polyarchy" (1997) *European Law Journal* 321. See also M Bishop "Vampire or Prince? The Listening Constitution and Merafong Demarcation Forum v President of the Republic of South Africa & Others" (2009) 2 *Constitutional Court Review* 320. Bishop discusses the fact that both theories are based on the question of who makes the decision. While in a representative democracy the representatives make decisions, in a direct democracy the people make the decisions.

⁴⁶ According to Held, Rousseau was of the view that the role of the citizen was "the highest to which an individual can aspire". See Held *Models of democracy* 46.

While the Constitution makes specific reference to representative and participatory democracy, it does not expressly refer to “direct” democracy. Referendums are provided for in the Constitution, which are seen as a form of direct democracy.⁴⁷ The Constitutional Court has also referred to elements of direct democracy in South Africa.⁴⁸ The court in these cases seems to assert that these direct elements are part of a more participatory model of democracy.⁴⁹ Direct democracy is sometimes also said to act as a “counterweight to political parties in a representative democracy” and to protect the rights of those who find it difficult to participate in existing representative and participatory structures.⁵⁰ For the most part, however, these claims appear to refer to a broader right of political participation, which is often far removed from the type of direct involvement of citizens in decision-making which is associated with direct democracy.

4 3 2 *Freedom of assembly: “a piece (moment) of original un-harnessed/untamed direct democracy”*

The perceived link between freedom of assembly and direct democracy has been asserted in the German case of *Brokdorf* as follows:

“[Demonstrations] offer...the possibility of exerting public influence on the political process, for the development of pluralist initiatives and alternatives or even for criticism and protest...; they contain a piece of *original un-harnessed/untamed direct democracy* which is appropriate to preserve the political operation from paralysis in its busy routine.”⁵¹

⁴⁷ Ss 84(2)(g) and 127 of the Constitution.

⁴⁸ See *Doctors for Life International v Speaker of the National Assembly & Others* 2006 6 SA 416 (CC) paras 90-99.

⁴⁹ *South African Transport and Allied Workers Union v Garvas* 2013 1 SA 83 (CC) para 62.

⁵⁰ R Malherbe & M van Eck “The state’s failure to comply with its constitutional duties and its impact on democracy” (2009) *TSAR* 209-223. The link between direct democracy and the protection of neglected groups is not necessarily clear. This is because within direct democracy, more often than not, decision making is based on the will of the majority. The manner in which decisions are made is not as important as the fact that the majority makes the decision. The emphasis is on uniformity and the “general will” rather than protection of minority voices.

⁵¹ BVerfGE 69, 315 (emphasis added). The original text: “Sie bieten ... die Möglichkeit zur öffentlichen Einflußnahme auf den politischen Prozeß, zur Entwicklung pluralistischer Initiativen und Alternativen oder auch zu Kritik und Protest ...; sie enthalten ein Stück ursprünglich-ungebändigter unmittelbarer Demokratie, das geeignet ist, den politischen Betrieb vor Erstarrung in geschäftiger Routine zu bewahren”. Translation found on <http://www.legislationline.org/topics/country/28/topic/15>. Translated

This idea, while attractive, is open to a number of criticisms. Firstly, direct democracy requires “the people” to be *present* in order to exercise such decision-making power. It cannot be said that in all protest actions the “people” are present. Protestors usually represent a small segment of the people. In a country as diverse as South Africa it would be very rare that a faction of protesters could be said to embody the “people”. Even where thousands of people are present, these participants cannot be said to represent the “entire polity”.⁵²

Secondly, it is difficult to conceptualise protest action as untamed. Salat argues that protest action cannot be said to be *un-harnessed* or *untamed*,⁵³ as it must occur within a particular legislative framework, which imposes numerous limitations on the exercise of the right.⁵⁴ The imposition of a substantial amount of limitations and qualifications of the exercise of this right through the Regulation of Gatherings Act is indicative of a *controlled* space of direct participation. As this control is largely exercised by State institutions, it is difficult to see how protest action can be *untamed* and direct. State parties dictate the bounds of the exercise of this freedom.

Thirdly, and most importantly, if direct democracy requires major decisions to be taken collectively by the people, and if freedom of assembly is a form of direct democracy, then the following question needs to be answered: how can major decisions be made through protest action? Even if “the people” in its entirety are present at a protest action, it is unlikely that such action will result in a decision being taken.⁵⁵ Protests and demonstrations are usually not spaces for collective decision making. This critique also incorporates the idea that direct democracy and representative democracy are in contradiction to each other, as discussed above. If it is assumed that these two systems cannot exist simultaneously, then protests would rarely be spaces of direct democracy. This is because protests are normally directed at representatives or institutions within an existing representative democracy. While protesters may want to influence state officials to make decisions, the protesters

by German Cases and Materials Under the direction of Professors P Schlechtriem, B Markesinis and S Lorenzand.

⁵² O Salat *The Right to Freedom of Assembly: A Comparative Study* (2015) 48.

⁵³ Salat *The Right to Freedom of Assembly* 48.

⁵⁴ See the discussion in chapter 3.

⁵⁵ Salat *The Right to Freedom of Assembly* 49.

themselves do not make decisions. Even in violent protests where pressure is placed by the protesters on an official, the power to change the decision is still vested in the official.⁵⁶ Protesters therefore may have the power to influence decisions, but not to make decisions.⁵⁷

4 3 3 *The link between protests and direct democracy*

The analysis above raises critical questions over the assumption that freedom of assembly is a form of direct democracy. Salat argues, on the basis of these criticisms, that the link made between assembly and direct democracy is nothing more than “a romantic metaphor, with close to zero effective meaning”.⁵⁸ In her view, it is not a lens which provides any substantial assistance in understanding freedom of assembly in modern democracies.

It nevertheless seems helpful to consider possible responses to these criticisms, as this may help us to understand the reasons why freedom of assembly is often linked to direct democracy. In the first place, as stated above, direct democracy requires “the people” to be *present*. While in national or provincial issues it is highly unlikely that the people can be present, it is possible that a substantial part of a specific local community may be present at demonstrations directed against local government. The protest actions in Merafong in 2005, regarding the change in municipal boundaries of that community, is an example of such protests.⁵⁹ The members of the Merafong community were resisting the proposals, through two Bills,⁶⁰ to incorporate parts of Merafong which up to then formed part of Gauteng within the North West province. The majority of the residents of the Merafong community were opposed to the proposal.⁶¹ Members of the community who were affected by this decision indicated

⁵⁶ See discussion in chapter 2 part 2 4 4.

⁵⁷ This idea is addressed under the discussion of representative democracy under part 4 4.

⁵⁸ Salat *The Right to Freedom of Assembly* 48.

⁵⁹ *Merafong Demarcation Forum & Others v President of the Republic of South Africa & Others* 2008 5 SA 171 (CC). See also Bishop (2009) *Constitutional Court Review* 313-317.

⁶⁰ The Twelfth Amendment Bill B33B-2005 and the Cross-boundary Municipalities Laws Repeal and Related Matters Bill B36B-2005.

⁶¹ *Merafong Demarcation Forum & Others v President of the Republic of South Africa & Others* 2008 5 SA 171 (CC) para 134-135. In this case, although the Merafong community had largely indicated their resistance to their incorporation in North West province, the amendment was passed. Therefore,

their resistance through petitions, demonstrations and assemblies.⁶² These series of protests arguably show that, where protests are specifically directed at a decision affecting a specific local community, and where a majority of the members of that community participate in those protests, it could be said that the polity is *present*.⁶³

Secondly, although Salat argues that protests are always subject to limitations⁶⁴ and therefore cannot be untamed, many protests in South Africa at times appear to be untamed. According to Woolman, the power of assemblies lies precisely in the fact that they are “loud, noisy, disruptive, and sometimes dangerous”.⁶⁵ Woolman states that “section 17 creates a unique space in which citizens can stand outside the Constitution”.⁶⁶ It is difficult however to reconcile this idea with current constitutional thought and case law.

Thirdly, it was pointed out above that, while in a direct democracy the people have the power to decide matters of substance, crowds that are assembled together generally do not take binding decisions. Although this is a valid point, it is nevertheless easy to see why freedom of assembly is linked to direct democracy. Freedom of assembly symbolises a space where the people proactively participate without the

although a large portion of the community were *present*, they still did not exercise *decision-making* power which is necessary in a direct democracy.

⁶² *Merafong Demarcation Forum & Others v President of the Republic of South Africa & Others* 2008 5 SA 171 (CC) para 134-135. The protesters included “residents, supported by community formations, which included the labour federation Congress of South African Trade Unions (COSATU), political organisations such as local branches of the South African Communist Party (SACP) and African National Congress (ANC), non-governmental organisations, churches, taxi organisations and social movements”.

⁶³ There are various other examples of protest action that were directed at decisions taken or laws adopted in the national or provincial spheres, yet were focused on the interests of a particular community. Some of these disputes led to court cases such as *Matatiele Municipality & Others v President of the Republic of South Africa & Others* 2006 5 SA 47 (CC); *Matatiele Municipality & Others v President of the Republic of South Africa & Others (No 2)* 2007 6 SA 477 (CC); *Poverty Alleviation Network & others v President of the Republic of South Africa & others* 2010 6 BCLR 520 (CC).

⁶⁴ See chapter 3.

⁶⁵ S Woolman “You Break it, You Own it: South African Assembly Jurisprudence after Garvis” (2015) 9 *Vienna J. on Int'l Const. L* 550.

⁶⁶ S Woolman “My tea party, your mob, our social contract: Freedom of Assembly and the Constitutional right to rebellion in *Garvis v SATAWU (Minister for Safety & Security, Third Party)* 2010 (6) SA 280 (WCC)” (2011) 27 *SAJHR* 348.

mediation of representatives.⁶⁷ Citizens do not have to wait for the state to invite them to participate in consultative processes, in which the terms of interaction are dictated by the state. During protests and other assemblies, citizens themselves, acting together, can determine the agenda as well as the terms of interaction. A protest in South Africa is a striking image of a collective citizenry proactively voicing their opinions and resolve. Woolman describes participating in demonstrations in South Africa as being “part of a truly dynamic and muscular beast”. He uses this imagery to describe a protest as a living, active collective being,⁶⁸ and claims that demonstration is a direct expression of popular sovereignty.⁶⁹

These responses to the criticisms outlined in the previous section show that there is a certain affinity between freedom of assembly and direct democracy. It is nevertheless misleading to view freedom of assembly solely through the lens of direct democracy. It may also be dangerous, to the extent that it creates the expectation that we can ignore an established representative system of government and rather give effect to the direct wishes of “the people”.⁷⁰

4.4 Freedom of assembly and representative democracy

4.4.1 Representative democracy

Modern democracies can largely be described as representative forms of government. It is therefore important to provide a brief overview of the development of representative democracy, with its roots in the liberal tradition. This section highlights important features of representative government in order to provide a platform to discuss the link between freedom of assembly and South Africa’s representative system of government. Representative democracy can be defined as a system of government where “the people” elect representatives through regular elections and

⁶⁷ Woolman (2011) *SAJHR* 346-353. Woolman (2015) *Vienna J. on Int'l Const. L* 550.

⁶⁸ Woolman (2015) *Vienna J. on Int'l Const. L* 550.

⁶⁹ Woolman (2015) *Vienna J. on Int'l Const. L* 550. For a full analysis of these ideas see also L Kramer *The People Themselves: Popular Constitutionalism and Judicial Review* (2004).

⁷⁰ This type of disregard of the representatives within a representative system negates an established and legitimate system of representative government. Therefore, freedom of assembly as a form of direct democracy is most likely to gain support in conditions where a representative system has degenerated into a system of tyranny or absolutism. See Salat *The Right to Freedom of Assembly* 49.

whereby those representatives make collective decisions on behalf of “the people”.⁷¹ Central to this conception of representative democracy is the vote.

The earliest conceptions of representative government came from the writings of Hobbes, Locke, Montesquieu, Bentham, Madison and James Mill.⁷² Several of these writers emphasised the impossibility of direct democracy in modern states. Some writers admired the active citizenship within more direct forms of government, but argued that modernisation and larger societies rendered direct democracy impossible in larger societies.⁷³ Others, such as Madison and Bentham, were highly critical of direct forms of government as being impractical and inevitable failures.⁷⁴ Madison emphasised that “pure democracies”, in other words direct democracy, were unstable. The “tyranny of the majority” and excesses of “pure democracy” could only be prevented through institutional arrangements and a system of representation.⁷⁵ Representative democracy principally developed from a liberal tradition.⁷⁶ Understandings of liberal democracy are therefore closely linked with the development of representative government. To a large extent, the idea of liberal democracy developed as a response to absolutism, despotic power and tyranny.⁷⁷ Liberalism highlighted the need to protect the freedom of individuals against these dangers. In accordance with this outlook, representative democracy is aimed at ensuring the protection of individuals *from* these abuses of State power. Central to these ideas is that human beings are free and equal.⁷⁸ This is closely related to a conception of negative freedom, namely the freedom *from* State power.⁷⁹ This led to restrictive ideas about the involvement of the people within State affairs. While sovereignty

⁷¹ Roux “Democracy” in CLOSA 10-4.

⁷² See generally Held *Models of democracy* 56-95. For the original works see T Hobbes *Leviathan* (1651); J Locke *Two Treatises of Government* (1689). C Montesquieu *The spirit of laws/ De l'Esprit des Lois* (1748).

⁷³ Held *Models of democracy* 66.

⁷⁴ 70-72.

⁷⁵ 73.

⁷⁶ 60.

⁷⁷ 60-62 and 81-83.

⁷⁸ Although the liberal thought on free and equal individuals was conceptualised early on through theorists such as Locke and Hobbes, these ideas were based on restrictive understandings based on property and excluded various groups from the conception of individuals. See generally J Locke *Two Treatises of Government* (1689).

⁷⁹ Held *Models of democracy* 78.

remained with the individual, in order to protect individual liberty, the State should be separate *from* the sphere of individuals (civil society).⁸⁰ There should be a minimalist and non-interventionist State.⁸¹

Even though sovereignty is vested in the people, once space has been created for regular elections, political power shifts to the representatives who can legitimately exercise state functions. Beyond this, the accountability of the governors to the governed is ensured through constitutional arrangements and political institutions. The vote also ensures political equality⁸² between citizens which is linked to conceptions of “free and equal individuals”. Political equality is necessary to establish the freedom of the individual.⁸³ Separation of powers is also a crucial mechanism for ensuring State accountability and utility within civil society. These features are aimed at ensuring protection for individuals – from the State and each other.⁸⁴ Even though representative democracy is based on the sovereignty of the people, this sovereignty does not require the *constant* direct involvement of the people in state affairs. The sovereignty of the people is expressed through the vote. This idea is completely at odds with the ideas of sovereignty and representation developed by Rousseau. These ideas can be referred to as restrictive or protective representative democracy⁸⁵ and were mainly based on understandings of the State as a potential threat to liberty. From this perspective, a citizen would not have to participate in politics beyond elections.⁸⁶

Although these ideas of a “protective” representative democracy are important, John Stuart Mill provided a different perspective on representative government. His ideas on representative government and its elements still influence modern democracies and the ideas of participatory and deliberative democracy as discussed in chapter five. Mill defined representative government as a form of government in which

⁸⁰ 77.

⁸¹ 75-77 and 81-84.

⁸² 78-79.

⁸³ 78.

⁸⁴ 78.

⁸⁵ 60.

⁸⁶ 78. See also G Quinot "Snapshot or Participatory Democracy? Political Engagement as Fundamental Human Right" (2009) 25 *SAJHR* 392 - 402.

“the whole people, or some numerous portion of them, exercise through deputies periodically elected by themselves, the ultimate controlling power, which, in every constitution, must reside somewhere.”⁸⁷

Central to Mill’s ideas on representative government was that, although sovereignty remained with the people, they exercised this “ultimate controlling power” through their representatives. Mill considered participation as an important aspect of representative government, although the vote remained the basis for the “ultimate controlling power”.⁸⁸ Unlike proponents of a protective notion of representative government, Mill considered active involvement and citizenship as vital to a representative system.⁸⁹ Although he emphasised the protection of the individual, participation was important to ensure a vibrant and informed electorate for the furthering of society.⁹⁰

Mill provided an additional justification for the limited role of the electorate in government, namely the necessity for *effective government*. He famously wrote that there is a “radical distinction between controlling the business of government and actually doing it”.⁹¹ This also adds to a restrictive role of the people within representative government. Active citizenship is considered a social good provided it does not disturb the effective running of government by those elected to be specialists. This elitist conception views the role of the electorate as being restricted to the voting process and participation only insofar as the electorate do not hinder the government.

Modern representative governments are characterised by universal adult suffrage, separation of powers, a free press, assembly and a general set of political institutions within the representative system.

4 4 2 South Africa’s representative democracy

The Constitution makes various references to the representative nature of the South African democracy. The representative model of democracy could be described as a

⁸⁷ JS Mill *Considerations of Representative government* (1861) 269.

⁸⁸ Held *Models of democracy* 97. The participation of individuals in between elections was not seen as important for exercising control but rather to provide for a more participatory form of representative government and for an informed citizenry. The space for the active citizen was mainly in order for individual development, debate and for an informed citizenry.

⁸⁹ 79.

⁹⁰ 80.

⁹¹ Mill *Considerations of Representative government* 229-30.

social contract⁹² between the “elected representatives” and “the people” as described in the Preamble to the Constitution.⁹³ The basis of this contract is mainly through the vote.⁹⁴ The people, by electing and voting for their representatives, set them a mandate to represent their interests. The legislature’s institutional legitimacy is based on the “will of the people” which is expressed through the vote.⁹⁵ A key aspect of South Africa’s vision of democracy is included in section 1(d), which lists “universal adult suffrage” as one of the values on which the Republic is based.

While the vote is central to representative democracy, an overly restrictive view of representative democracy over-emphasises the role of representatives rather than the role of the people. The Constitutional Court has on occasion provided a very formalistic and restrictive view of representative democracy. Such a formalistic view of representative democracy was displayed in *United Democratic Movement v President of the Republic of South Africa* (“UDM”).⁹⁶ The court had to decide whether legislation permitting floor crossing at the national, provincial and local levels was constitutional. The court stated that voters cannot control the conduct of their representatives between elections.⁹⁷ It went on to state that the recourse for voters, who felt aggrieved by the decisions of those they elected, is at the next election.⁹⁸ In this judgment, representative democracy is conceived as a system in which the electorate can only make political decisions and control the conduct of their representatives every few years.⁹⁹

⁹² Woolman (2011) *SAJHR* 353.

⁹³ The Preamble to the Constitution.

⁹⁴ S 19 of the Constitution. S 19(3) provides that “every adult citizen has the right to vote for any legislative body established in terms of the Constitution”. Therefore through the exercise of the right to vote, the citizenry elects its representatives.

⁹⁵ N Raboshakga “Towards participatory democracy, or not: the reasonableness approach in public involvement cases” (2015) 31 *SAJHR* 4 10.

⁹⁶ *United Democratic Movement v President of the Republic of South Africa & Others (African Christian Democratic Party & Others Intervening; Institute for Democracy in South Africa as amici curiae)* 2003 1 SA 488 (CC).

⁹⁷ Para 49.

⁹⁸ Para 49.

⁹⁹ See Quinot (2009) *SAJHR* 392 - 402.

Another judgment which highlights a restrictive and formalistic interpretation of representative democracy is the dissenting judgment of Yacoob J in *Doctors for Life*.¹⁰⁰ This case dealt with whether the Constitution placed an enforceable obligation on the legislature to facilitate public participation/involvement in the legislative process. In his judgment, Yacoob J states that “government by the people” means that decisions of the National Assembly are made by representatives.¹⁰¹ Yacoob J equates the decisions and activities of the representatives with the decisions of the people. His understanding of representative democracy relies heavily on the notion that the decisions of the representatives (the elected) are *identical* to the “will of the people”. He also indicates that the right to vote is a “participatory element” of our democracy.¹⁰² It seems that any frustration that the people have with those elected should be settled at the following elections. This restrictive view of representative democracy does not enable an understanding of the innate tension between the people and their representatives *between* elections.¹⁰³ This interpretation is in line with the liberal tradition of representative thought and it seems that Yacoob J assumes the unity and identity of representatives and the electorate.¹⁰⁴ Yacoob J states, “[i]t is these elected representatives that govern the people and their representative activities *are activities of the people*”.¹⁰⁵ Although the liberal tradition of representative democracy recognises

¹⁰⁰ *Doctors for Life International v Speaker of the National Assembly* 2006 6 SA 416 (CC) paras 246-339.

¹⁰¹ Paras 282-284.

¹⁰² Para 291. It is difficult to reconcile this understanding with the idea that participatory democracy supplements representative democracy, and therefore refers to something additional to the vote. See the discussion of participatory democracy in chapter 5.

¹⁰³ This restrictive and formal interpretation of representative democracy almost resounds with Rousseau’s criticism of representation and sovereignty – as discussed above in 4.3.1. Yacoob J assumes that the vote confers all authority to the representatives. Once South Africans have voted, sovereignty is represented until the next election. Parliament cannot be compelled to facilitate public participation in the absence of a constitutional provision which clearly and unequivocally requires it.

¹⁰⁴ See particularly paras 292, 294 and 319 of *Doctors for Life International v Speaker of the National Assembly* 2006 6 SA 416 (CC). See also H Botha “Representing the poor: law, poverty and democracy” (2011) 22 *Stell LR* 521 525.

¹⁰⁵ *Doctors for Life International v Speaker of the National Assembly* 2006 6 SA 416 (CC) para 292 (emphasis added). See also para 292 where he states “[t]o undermine these representatives is to undermine the political will of the people and to negate their choice at free and fair elections”. Yacoob J’s interpretation is informed by a particular vision of democracy which emphasises the decisions of the elected and equates these decisions with the decisions of the people.

the tension between the State and the people, it seems to sidestep the enquiry into this tension by equating the people's decisions with the activities of the representatives.¹⁰⁶

Yacoob J also emphasises the history of disenfranchisement of the black majority under apartheid.¹⁰⁷ He identifies the historical lack of representation of the majority of the people as the core cause of the absolutism and tyranny which characterised apartheid. He thus connects the struggle against apartheid with the struggle for the vote and representation in Parliament.¹⁰⁸ Without in any way doubting the great importance of the shift from a racial oligarchy to a democracy based on universal adult suffrage, it could nevertheless be asked whether Yacoob J does not take a too restrictive view of the political disempowerment of the black majority under apartheid, and whether this view does not leave too little scope for forms of political participation other than the vote. In particular, his view that representation in Parliament should go a long way towards protecting human rights, seems to discount the need for extra-institutional political struggles that are waged through protests.¹⁰⁹

Although Yacoob J's reasoning was rejected by the majority of the Constitutional Court in *Doctors for Life*, and although the Court seems to have moved away from the view of democracy adopted in *UDM*, these restrictive ideas nevertheless still seem to inform some of the thinking within the executive, legislature and the ANC.¹¹⁰ The

¹⁰⁶ This seems to point to a contradiction in this restrictive idea of representative democracy as provided above. While the liberal tradition of representative democracy provides a clear *separation* between the State and civil society, Yacoob J seems to indicate that the decisions of the representatives and the people are *identical*. It is an anomaly as the people need to be separate and protected from the State, but their will is also expressed through their representatives who are the State.

¹⁰⁷ For a full analysis of the vote in terms of section 19 and history of apartheid see the discussion under 2 4 1.

¹⁰⁸ *Doctors for Life International v Speaker of the National Assembly* 2006 6 SA 416 (CC) para 294.

¹⁰⁹ See part 2 4 1.

¹¹⁰ See part 2 4 4 4. The ANC increasingly equates itself with "the people". See for example K Motau "ANC is incorruptible as an organisation because the ANC is the people of SA" (03-07- 2017) <<http://ewn.co.za/2017/07/03/anc-is-incorruptible-as-an-organisation-because-the-anc-is-the-people-of-sa>> (accessed 04-08-2017). This article highlights how an ANC spokesperson equates the ANC with the people, and argues that the organisation is not corrupt because it is representative of the people. See also B Capazorio "Zuma: If you want to know reasons for cabinet reshuffles win elections" *Times Live* (17-11-2017) <<https://www.timeslive.co.za/politics/2017-11-16-zuma-if-you-want-to-know-reasons-for-cabinet-reshuffles-win-elections/>> (accessed 18-11-2017). Former President Jacob Zuma stated in parliament, in relation to his decision to change his cabinet that "the changing of a minister is

manner in which the executive and legislature view democracy shapes the manner in which the democracy operates and the exercise of rights within such a democracy, especially freedom of assembly as shown in chapter three.

4 4 3 Freedom of assembly in a restrictive representative democracy

Although modern representative democracies recognise freedom of assembly as a fundamental human right, freedom of assembly does not fit well within the formal and institutional conception of representative democracy outlined above. Firstly, the idea that the people do not have a space for controlling the conduct of their representatives outside established institutions minimises the power of protest action.¹¹¹ The majority of protests in South Africa are directed towards the representatives; however, it seems that from this perspective, the elected can largely ignore protests until the following election.¹¹² Furthermore, the formal conception of representative democracy views the vote as the only expression of popular sovereignty. However, this cannot mean that the people do not hold any power beyond the vote.¹¹³ Protests in South Africa indicate a tension between the elected and the electorate. The formal and institutionalised model of representative democracy does not expose the inherent tensions, disagreement and antagonism inherent in protests. It sidesteps this tension by requiring that any disagreement or complaint be remedied through the ballot.

Additionally, understanding the historical denial of the political rights of black people during apartheid solely through the prism of the vote has problematic consequences for protests in the new constitutional dispensation. The problem is that it renders extra-institutional spaces for participation such as protest action unimportant.¹¹⁴ It thus minimises the space for struggles which, for whatever reason, cannot be expressed through the vote.¹¹⁵

the prerogative of the president and the reasons are *not necessarily to be known by people*. If you want to know, *win elections* and have a government" (emphasis added). He thus indicated that victory at election time is paramount and that he is not compelled to provide reasons to the electorate.

¹¹¹ J Duncan *Protest Nation: the right to protest in South Africa* (2016) 45.

¹¹² Quinot (2009) *SAJHR* 397-398.

¹¹³ H Botha "Fundamental rights and democratic contestation: reflections on freedom of assembly in an unequal society" (2017) 21 *Law, Democracy and Development* 223-224.

¹¹⁴ See the discussion under part 2 4 1.

¹¹⁵ The institutional idea of representative democracy also seems to underestimate the extent to which certain classes of people are excluded from full citizenship and the exercise of fundamental human

Moreover, representative democracy as rooted in the liberal tradition views effective government as essential. Freedom of assembly usually takes place in the form of disruption and demonstration. Protests directed at government often aim to disrupt and destabilise the operations of government.¹¹⁶ The executive in South Africa seems to have a restrictive view of representative democracy which places much emphasis on the administration and effectiveness of government.¹¹⁷ The executive at times seems to view protests as a hindrance to effective government and democracy rather than as an opportunity to interact with the participants' view. In this view, protesters are uninformed, ignorant or troublemakers¹¹⁸ who violate the Constitution and the very basis of democracy through the vote. The repressive reaction to protests by the police and other government departments indicate that protests directed towards government are rarely seen as beneficial to democracy.¹¹⁹

However, the Constitutional Court has since moved beyond this restrictive view of representative democracy, by elaborating on two additional supplementing models of democracy, namely participatory and deliberative democracy. These two ideas of democracy, which will be discussed in chapter five, appear to enable a more nuanced understanding of the relationship between freedom of assembly and existing representative institutions. They also seem to be more in line with the German Constitutional Court's statements in *Brokdorf* that assemblies contribute to the "formation of political will and opinion in a representative democracy",¹²⁰ and that assemblies can play a stabilising role in representative democracies by providing "a political early warning system".¹²¹ These ideas presuppose an existing and legitimate

rights. See Botha (2017) *Law, Democracy and Development* 223-2244. The overemphasis of the vote does not necessarily leave space for citizens to voice these struggles.

¹¹⁶ See Duncan *Protest Nation* 36-41. See further Woolman (2015) *Vienna J. on Int'l Const. L* 550. See also C Mbazira "Service delivery protests, struggle for rights and the failure of local democracy in South Africa and Uganda: Parallels and divergences" (2013) 29 *SAJHR* 266-268.

¹¹⁷ See Duncan *Protest Nation* 46. Duncan refers to former Presidents Mbeki's emphasis on effective government which led to a more centralised executive branch of government. The emphasis on effective government led to executive attempts to control or prevent protest action.

¹¹⁸ See T Madlingozi "Post-Apartheid Social Movements and Legal Mobilisation" in *Socio-Economic rights in South Africa: Symbols or Substance?* (2013) 106-112.

¹¹⁹ 106-112.

¹²⁰ BVerfGE 69, 315 347 (1985), as translated by Salát *The Right to Freedom of Assembly* 49.

¹²¹ 48. This statement expresses the idea that freedom of assembly provides citizens with the opportunity to show discontent and popular disaffection so that the representatives can address

representative democracy, and a dialogue between citizens and their representatives. Moreover, it is doubtful whether the above statements, which place freedom of assembly within an existing representative system, are reconcilable with the *Brokdorf* court's statements regarding the link between freedom of assembly and direct democracy.¹²²

4.5 Conclusion

Freedom of assembly is a vital part of a modern democracy. However, the traditional models of representative and direct democracy seem inadequate for fully understanding the link between democracy and protest action.

While direct democracy is a normative ideal in democratic theory,¹²³ it does not seem possible to have a “pure” form of direct democracy in contemporary democracies, which are largely representative in nature. This chapter discussed the link between demonstrations and direct democracy. It established that, while freedom of assembly reinforces the idea of an active citizenry and highlights the importance and centrality of the people in a democracy beyond elections, protests are not spaces for binding decision-making, and accordingly cannot be a form of direct democracy.

The chapter then turned to examine the link between freedom of assembly and representative democracy. It found that overly formalistic and restrictive ideas of representative democracy — which still influence decision making by the legislature, executive and judiciary — do not enable an adequate understanding of the social context of the increase in protest actions in South Africa. These understandings of democracy assume the identity of the people and their representatives, and minimise the role of the people in a democracy between elections. The oversimplification of democracy by equating it with the vote does not allow for spaces of extra-institutional participation beyond and outside elections. However, this critique of a formalistic

problems highlighted by the demonstration/protest. On this view, protest is legitimate as it appeals to the representatives — who have legitimacy to exercise public power — to address the issues.

¹²² Salat states: “This rationale is actually the opposite of the previous one: assemblies are perceived to be eminently *indirectly* related to public power, exerting a mediating function from the people to government. I even think the two rationales are irreconcilable, as this one presupposes, the previous one denies a functioning, legitimate representative system.” Salat *The Right to Freedom of Assembly* 49.

¹²³ Roux “Democracy” in *CLOSA* 10-2.

understanding of representative democracy should not be taken to suggest that ideas of representative democracy are unable to shed light on the meaning and importance of freedom of assembly. A more nuanced conception of representative democracy could possibly help to make sense of the role of assemblies and demonstrations in facilitating democratic processes of opinion- and will-formation, and instituting a dialogue between citizens and their representatives. This will be examined in more depth in the next chapter.

Chapter 5

5 Freedom of Assembly: Participatory, deliberative and agonistic democracy

5 1 Introduction

Chapter four concluded that the idea of direct democracy and restrictive understandings of representative democracy cannot fully explain the nature and importance of freedom of assembly. This chapter seeks to determine whether other conceptions of democracy can assist us in understanding protest action in South Africa. The Constitutional Court has affirmed that participatory and deliberative democracy are part of South Africa's democratic vision. Both these models of democracy move away from restrictive and formalistic understandings of representative democracy. Both are premised on the idea that South Africa "belongs to all who live in it"¹ and attempt to reinject ideas of an active citizenry — beyond the elections — into the representative model. The democratic possibilities of protest action can also possibly be better understood and supported through the democratic model of agonistic pluralism. This chapter seeks to determine if and to what extent agonistic pluralism may allow for a form of extra-institutional politics — as expressed through demonstration and assemblies — that supports democratic values.

The chapter will first provide a brief description of participatory and deliberative democracy. It will then assess the strengths and weaknesses of these models in trying to understand protest action. Thereafter it will focus on agonistic democracy as developed by Chantal Mouffe, and examine whether and to what extent this idea can explain protest action in South Africa.

5 2 The role of freedom of assembly in the formation of political will and opinion

In the German case of *Brokdorf* the court stated that assemblies and demonstrations contribute to the "formation of political will and opinion *in a representative democracy*".² Salat explains that demonstrations can play an important part in the formation of *public* opinion and can influence the formation of political will by exerting pressure on the *decision-making process*.³ The people thus use demonstrations to communicate their opinions to their elected representatives, and to

¹ The preamble to the Constitution of South Africa.

² BVerfGE 69, 315, 347 (emphasis added).

³ O Salat *The Right to Freedom of Assembly: A Comparative Study* (2015) 49.

influence the decisions taken by them. Here, the court does not refer to direct democracy, as the people themselves do not take decisions. Instead, it places freedom of assembly within an existing representative democracy. At the same time, however, it resists a restrictive interpretation of representative democracy which simply emphasises the vote. This approach to democracy can possibly provide a more appropriate basis for understanding protest action.

Both participatory and deliberative democracy seem to be in line with this idea. Participatory democracy concerns the question whether and how the people should be given the right to participate in the decisions which affect them.⁴ Deliberative democracy similarly emphasises participation. But while participatory democracy focuses on the *creation* of spaces for participation, deliberative democrats emphasise that, once those spaces have been established, they need to meet a specific set of standards to ensure that decisions are legitimate. Both these models must be understood within the context of an existing representative democracy rather than a challenge to that system. Because deliberative democracy also requires extensive participation, these two concepts of democracy are sometimes used interchangeably.⁵

5 2 1 Participatory democracy

5 2 1 1 A brief overview

Participatory democracy developed as a means of reviving the ideas of Rousseau, Marx and Mill on the value of direct participation in government.⁶ It is important to note that these ideas of participatory democracy were influenced by these writers, but at

⁴ T Roux “Democracy” in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (RS 6 2013) 10-14. Roux describes this model of democracy concisely as

“essentially about the question whether, and if so, how, citizens should be given the right to participate in the making of decisions that affect them, notwithstanding the fact that the basic form of political organisation in the modern nation-state is, and is likely to remain, representative democracy.”

⁵ For example, in discussing the nature of participatory democracy reference is made to s 1(d) of the Constitution, which refers to “accountability, responsiveness and openness”. The same provision is also used to substantiate the idea of deliberative democracy. See M Bishop “Vampire or Prince? The Listening Constitution and *Merafong Demarcation Forum v President of the Republic of South Africa & Others*” (2009) 2 *Constitutional Court Review* 320 at 321 where Bishop writes “...if you look a bit closer at the actual theories, there is an extensive overlap. Participatory democrats generally believe decisions should be taken through deliberation, and deliberative democrats almost universally call for greater citizen participation”.

⁶ Roux “Democracy” in CLOSA 10- 15. See also D Held *Models of democracy* 3rd ed (2006) 209.

the same time also developed as a response to the shortcomings in the republican, liberal and Marxist theories.⁷

The main contributors to participatory democracy, C Pateman and CB Macpherson, critiqued the restrictive and formalised conception of representative democracy rooted in the liberal tradition. These critiques related to the liberal notion of a strict separation between the State and civil society.⁸ They stressed that the State is neither impartial nor separate from civil society. Therefore, as the State participates in recreating and supporting unequal relations in the private sphere (civil society), the vote is insufficient to ensure the accountability of the State to the governed.⁹ Participatory democrats also accept the impossibility of self-government and direct democracy in the modern nation state.¹⁰ However, it does not follow that more spaces for direct participation, and continuous spaces for effective and meaningful participation, are not possible.

Participatory democrats accept that modern societies are inherently representative. However, they call for more communication between the electorate and the elected beyond and between elections.¹¹ Participatory democracy is considered a compromise between liberal conceptions of representative democracy and ideas of direct democracy.¹² From the practical perspective, it does not seek to substitute the representative system, but to create participatory spaces within the representative system to ensure accountability, transparency and openness.¹³ Through a more participatory form of democracy, the inherent shortfalls of a restrictive representative democracy will be cured. This is because through participation the quality of democracy improves as citizens can participate in the making of those decisions which directly affect them. Additionally, participation in those spaces performs an educative function for the citizenry.¹⁴ Participation is seen as having an instrumental role, rather

⁷ Held *Models of democracy* 209; C Pateman *Participation and Democratic Theory* (1970) 13. See also D Vitale "Between participatory and deliberative democracy: A contribution to Habermas" (2006) 32 *Philosophy & Social Criticism* 739 749.

⁸ C Pateman *The problem of political obligation: a critique of liberal theory* (1985) 177. See also Held *Models of democracy* 210.

⁹ Held *Models of democracy* 210.

¹⁰ 211-212.

¹¹ Pateman *Participation and Democratic Theory* 42.

¹² Bishop (2009) *Constitutional Court Review* 320.

¹³ Vitale (2006) *Philosophy & Social Criticism* 750.

¹⁴ Pateman *Participation and Democratic Theory* 42. Here Pateman writes:

than being an end in itself.¹⁵ Emphasis is therefore placed on the process of participation. Participatory democrats take for granted that participation can lead to more informed citizens, fewer social inequalities, and more legitimate decisions.¹⁶ Therefore, although there are various ideas within participatory democratic thought about where and how participation should occur, the emphasis is on ensuring that there are institutionalised spaces for participation created within a representative democratic base. For the participatory democrat, decisions are *legitimate* insofar as they ensure spaces for citizen participation.¹⁷

5 2 1 2 The distinction between participatory democracy and direct democracy

According to Held, participatory democracy and direct democracy are closely related.¹⁸ Held points out that participatory democracy may be seen as a modern form of direct democracy.¹⁹ Even though they are related, it is nevertheless problematic to treat participatory democracy as a modern form of direct democracy, as this hides important differences between the two concepts. This is an important point, as the discussion in chapter four highlighted key problems with the notion that freedom of assembly can be understood as a form of direct democracy.²⁰ If it is simply assumed that participatory democracy is direct democracy, then the same reasoning as provided in chapter four could be used to argue that freedom of assembly is not a form

"The existence of representative institutions at national level is not sufficient for democracy; for maximum participation by all the people at that level socialisation, or 'social training', for democracy must take place in other spheres in order that the necessary individual attitudes and psychological qualities can be developed. This development takes place through the process of participation itself. The major function of participation in the theory of participatory democracy is therefore an *educative one*, educative in the very widest sense, including both the psychological aspect and the gaining of practice in democratic skills and procedures." (emphasis added)

¹⁴ Bishop (2009) *Constitutional Court Review* 320.

¹⁵ Vitale (2006) *Philosophy & Social Criticism* 750.

¹⁶ Roux "Democracy" in *CLOSA* 10- 17.

¹⁷ Bishop (2009) *Constitutional Court Review* 320.

¹⁸ Held *Models of democracy* 4. Held refers to direct and participatory democracy interchangeably in the introductory chapter and refers to direct participatory democracy in subsequent chapters.

¹⁹ Held *Models of Democracy* 210-212. Held discusses the emergence of participatory democracy as a means to modernise those elements of direct participation within the classical model of direct democracy. See also G Quinot "Snapshot or Participatory Democracy? Political Engagement as Fundamental Human Right" (2009) 25 *SAJHR* 397-398.

²⁰ See chapter 4 part 4 3 2 and 4 5.

of participatory democracy. The differences between the two concepts relate to two questions, namely *who* initiates participation and *who* makes the decisions.

In the first place, in the representative and participatory models of democracy, it is the state which facilitates public involvement.²¹ The state (the representatives) consequently creates the space for public participation and thus initiates the participation. This can be explained with reference to the distinction between “invited” spaces and “invented spaces” of participation.²² The participatory space is mostly reliant on the existing system to create and invite the electorate to participate. The control of these spaces is in the state’s hands, and this may minimise the true purpose of direct democratic action. Direct democracy, on the other hand, presupposes that the power is in the hands of “the people” who themselves may create or initiate the space for direct participation. Direct democratic action places the onus on the people to create invented spaces for participation. Direct democracy thus typically occurs without the mediation of the representative state.²³

Secondly, the views expressed by participants in a participatory democracy are not binding on the representatives. It is of course possible that participation may impact the decisions made. But even where the people manage to convince and affect the outcome of a decision, it is problematic to attribute those actions as decision-making. The decision ultimately lies with the representatives, as they have the legitimate public power to make such decisions. By contrast, direct democracy empowers “the people” themselves to make decisions.

5 2 1 3 South Africa’s participatory democracy

The South African Constitution makes various references to “participatory democracy”.²⁴ Despite some decisions of the Constitutional Court in which it adopted a restrictive view of representative democracy (as discussed in chapter four), the Court

²¹ *Matatiele Municipality & Others v President of the Republic of South Africa & Others (No 2)* 2007 6 SA 477 (CC) para 58.

²² F Mirafteb “Invited and Invented Spaces of participation: Neoliberal Citizenship and Feminists’ expanded notion of politics” (2004) 1 *Wagadu* 1 7. See also A Cornwall ‘Locating Citizen Participation’ (2002) 33 *IDS Bulletin*.

²³ Ss 84(2)(g) and 127 of the Constitution make provision for referendums, which are a form of direct democracy; however, the state nevertheless mediates by formulating the questions to be voted on.

²⁴ Ss 57(1)(b), s 70(1) and 117(1)(b) of the Constitution.

has since affirmed that South Africa's democracy has participatory elements.²⁵ By emphasising participatory democracy as contemplated by the Constitution, the Court has affirmed why the principle of participation is important and what it seeks to achieve. The Court in *Doctors for Life* linked the principle of participatory democracy to the idea that the democratic government must be "accountable, open and transparent".²⁶ Additionally participation is important because it creates an active citizenry, enhances the "civic dignity" of the citizenry and performs an educative role for those who participate.²⁷ Importantly, participation "strengthens the *legitimacy* of legislation in the eyes of the people".²⁸

The Constitutional Court has also dealt with the relationship between participatory and representative democracy. It has stressed that representative democracy through the vote would be inadequate without participatory democracy.²⁹ Participatory democracy creates additional mechanisms for instituting a "dialogue" between representatives and the electorate.³⁰ The Court has emphasised that the two conceptions of democracy should not be seen as being in tension with each other. Participatory democracy should supplement representative democracy.³¹ There is

²⁵ *Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others* 2016 5 SA 635 (CC) para 57; *Matatiele Municipality & Others v President of the RSA & Others (No 2)* 2007 6 SA 477 (CC) ("*Matatiele 2*") para 40, also see para 57.

²⁶ *Doctors for Life International v Speaker of the National Assembly & Others* 2006 6 SA 416 (CC) para 116.

²⁷ *Doctors for Life International v Speaker of the National Assembly & Others* 2006 6 SA 416 (CC) para 115. See also *Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others* 2016 5 SA 635 (CC) para 57 where the court states that "[i]t is beneath the dignity of those entitled to be allowed to participate in the legislative process to be denied this constitutional right".

²⁸ *Doctors for Life International v Speaker of the National Assembly & Others* 2006 6 SA 416 (CC) para 115 (emphasis added).

²⁹ Para 115 where Ngcobo J states:

"General elections, the foundation of representative democracy, would be meaningless without massive participation by the voters. The participation by the public on a continued basis provides vitality to the functioning of representative democracy."

³⁰ *Doctors for Life International v Speaker of the National Assembly & Others* 2006 6 SA 416 (CC paras 111, 115 & 122; and *Matatiele 2* paras 40, 59, 50 & 129.

³¹ *Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others* 2016 5 SA 635 (CC) para 57. *Doctors for Life International v Speaker of the National Assembly & Others* 2006 6 SA 416 (CC) para 115.

nevertheless a tension between the two, which is evident from the fact that participation does not necessarily affect the outcome or decision made by the legislature.³² This poses the danger that meaningful participation may be prevented, and that public participation may become a sham.³³ The court has attempted to counter the danger of “sham” participation by determining that there should be “reasonable opportunity”³⁴ for participation and that those who participate should “enjoy the assurance that they will be *listened to*”.³⁵ These ideas fit better under deliberative democracy and will be discussed below in 5 2 3 3.

³² *Merafong Demarcation Forum & Others v President of the Republic of South Africa & Others* 2008 5 SA 171 (CC) para 49, 50 and 59.

³³ *Merafong Demarcation Forum & Others v President of the Republic of South Africa & Others* 2008 5 SA 171 (CC) para 282. Here Sachs J noted the danger that the perception of the public may be that their participation was a mere sham. See further the dissenting judgment of Van der Westhuizen J in *Doctors for Life International v Speaker of the National Assembly & Others* 2006 6 SA 416 (CC) para 244 where he states that, if:

“...all that is required is to “involve” the public by, for example, mechanically holding public hearings for every piece of legislation...participatory democracy would appear to be quite cosmetic and empty, in spite of any idealistic and romantic motivation for promoting it.”

³⁴ Sachs J stated as follows in *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* 2006 2 SA 311 (CC) at para 630:

“The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a *reasonable opportunity* is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a *reasonable opportunity* will depend on the circumstances of each case.” (emphasis added)

This statement was made with regard to section 4 of the Promotion of Administrative Justice Act 2000 which deals with administrative action affecting the public.

³⁵ *Doctors for Life International v Speaker of the National Assembly & Others* 2006 6 SA 416 (CC) para 234. On the significance of listening (as opposed to merely “hearing”) in participatory democracy, see Bishop (2009) *Constitutional Court Review* 323. In the recent case of *Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces* 2016 5 SA 635 (CC), the Constitutional Court emphasised that reasonableness is an important indicator to determine whether the legislature fulfilled its duty of facilitating public participation. The court uses the reasonableness standard to address concerns about “sham” participation. What is reasonable depends on the context and circumstances of the case. *Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces* 2016 5 SA 635 (CC) para 60 and *Doctors for Life* at para 127. See also *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* 2004 6 SA 505 (CC) where Mokgoro J held at para 49 “[i]n dealing with the issue of reasonableness, context is all important”.

The focus of the jurisprudence on participatory democracy is mainly on the duty of the legislature/executive rather than on the participation itself. The court enquires whether the legislature has taken reasonable steps to facilitate public participation. This reinforces the idea that the space is controlled by the legislature. This seems to be the shortcoming of the jurisprudence on participatory democracy. The emphasis is on the representatives creating institutional spaces for participation without necessarily considering the substantive requirements of what would constitute meaningful participation.³⁶

The Constitutional Court has mostly focussed on the obligation on the State to make spaces available for participation and engagement. It thus emphasises participation in invited spaces, rather than in spaces created by the people themselves. The obligation is on the state to facilitate or create such spaces.

5 2 2 Protest as a form of participatory democracy

In *SATAWU*, the Court emphasised that freedom of assembly is part of our participatory democracy. In its view, the importance of freedom of assembly for democracy lies in its ability to provide for participation of the people in the representative system.³⁷

Freedom of assembly may be part of our participatory democracy as it allows the people to participate in the system beyond elections. Furthermore, participatory

³⁶ *Mnisi and Others v City of Johannesburg* (08/17819) [2009] ZAGPJHC 55 para 21 held that “[t]here is clearly a profound difference between informing the community of decisions taken and engaging the community in arriving at agreed or mediated solutions”. See also L Chenwi “Democratizing the Socio-Economic Rights-Enforcement Process” in GH Alviar, K Klare & LA Williams (eds) *Social and Economic Rights in Theory and Practice: Critical Inquiries* (2014) 178 182. Chenwi distinguishes between meaningful participation and mere participation within the context of meaningful engagement.

³⁷ The court firstly highlights the importance of freedom of assembly in its historical context. *South African Transport and Allied Workers Union v Garvas* 2013 1 SA 83 (CC) para 62:

“Spontaneous and organised protest and demonstration were important ways in which the excluded and marginalised majority of this country expressed themselves against the apartheid system, and was part and parcel of the fabric of the participatory democracy to which they aspired and for which they fought.”

The court then goes on to explain the link between freedom of assembly and participatory democracy in footnote 29 by referring to para 115 of *Doctors for Life International v Speaker of the National Assembly & Others* 2006 6 SA 416 (CC) which emphasised the importance of public participation in a representative system.

democracy emphasises *dialogue* between representatives and the electorate. Protests in the form of petitions, demonstrations and assemblies are quite often directed at representatives. To that extent, protests can be said to be part of an ongoing dialogue between the representatives and the electorate. In addition, participatory democracy places an obligation on representatives to facilitate participation. Even though protests typically occur in invented rather than invited spaces, the State nevertheless plays an important role in controlling those spaces. As discussed in chapter three, the legislative framework places quite a bit of control in the hands of the local municipality. Protests are therefore reliant on representative institutions. In these protests, there is also no decision-making, which seems to place freedom of assembly within participatory democracy.

While certain types of protest may fit comfortably within the participatory paradigm, it is doubtful whether all protests can. Some of the protests in Marikana, as discussed in chapter two, fit awkwardly with ideas of participatory democracy. These protests were in direct opposition to the existing representative system within trade unions and the State. While some of the miners' complaints were directed at these institutions, at times there was a complete rejection of these institutionalised spaces. The Marikana protests were volatile and unpredictable, and involved a great deal of violence between the miners and the police. Even though the model of participatory democracy recognises the tension between representatives and the people, it seems to anticipate a constructive relationship between them. It does not explain the violence and antagonism of existing relationships and seems to assume that more participation — in these invited spaces — will create legitimate decisions. Furthermore, in *SATAWU* the court interpreted certain forms of protest as illegitimate forms of expression. On this interpretation protests seem to be illegitimate where the police/municipality cannot control the participants.³⁸ Where masses of protesters move beyond the bounds of the institutionalised control of the police and municipalities, the court seems more willing to accept that the participatory space transforms into an illegitimate space of expression.

³⁸ See the discussion of *SATAWU* in chapter 3 part 3.3.

On some understandings, freedom of assembly, or at least some instances of it, occurs outside of participatory democracy.³⁹ Here it is emphasised that protests do not take place within “invited” spaces of participation created by government. Instead, protests are *initiated* and created by the people and not their representatives. Atkinson emphasises that protests increase where representative and participatory institutions fail.⁴⁰ Protests happen when engagement, in participatory spaces, fail. Duncan also seems to distinguish between an operational and institutional participatory democracy and protests which seem to fall outside these spaces.⁴¹ Woolman emphasises that freedom of assembly “vouchsafes a commitment to a form of democracy in which the will of the people is not always mediated by political parties and the elites that run them”.⁴² Participatory democracy however relies on the mediation of representatives to a certain degree.

Within the participatory model, freedom of assembly is seen as a vehicle for ensuring openness, responsiveness and accountability⁴³ in a mainly representative government. As indicated by *SATAWU*, the Constitutional Court of South Africa seems to view freedom of assembly as an example of participatory democracy.⁴⁴ If the court views freedom of assembly as part of the participatory democracy paradigm, then this provides a greater space for the State to control dissent. This is problematic as it may leave no space for citizens to go outside the bounds of State control by, for example, acting in a spontaneous fashion. This leaves limited scope for the power of the people to engage in direct democratic action.

³⁹ Bishop (2009) *Constitutional Court Review* 320 358-360. Bishop refers to “radical participation”, which includes protests, as a part of participatory democracy. However, in this Chapter, the term “participatory democracy” is used to refer to what Bishop terms “traditional participation”.

⁴⁰ D Atkinson “Taking to the streets: has developmental local government failed in South Africa?” in S Buhlungu, J Daniel, R Southall & J Lutchman (eds) *State of the Nation South Africa 2007* (2007) 53-77. See also C Mbazira “Service delivery protests, struggle for rights and the failure of local democracy in South Africa and Uganda: Parallels and divergences” (2013) 29 *SAJHR* 251-275, 252, 264 and 265. Mbazira provides an analysis of local government failure and of public protests as a response to such failure.

⁴¹ J Duncan *Protest Nation: the right to protest in South Africa* (2016) 1.

⁴² Woolman (2011) *SAJHR* 348.

⁴³ S 1(d) of the Constitution refers to democratic government to ensure accountability, responsiveness and openness.

⁴⁴ *South African Transport and Allied Workers Union v Garvas* 2013 1 SA 83 (CC) paras 62 and 64.

5 2 3 *Deliberative democracy*

5 2 3 1 Brief overview

Deliberative democracy is similar to participatory democracy and also developed as part of a critique of restrictive understandings of representative democracy. It is closely linked to institutionalised forms of participatory democracy, but is more concerned with the *manner* in which decisions are taken.⁴⁵ There are different versions of deliberative democracy, but most of these have been influenced by Habermas and Rawls, the major contributors to this model of democratic thought.⁴⁶

Similar to participatory democracy, deliberative democracy seeks to improve the quality of democracy. Deliberative democrats also place their ideas within existing representative systems. Thus, they do not seek to replace or challenge existing representative institutions, but rather want to ensure that the decisions made by political institutions, participatory bodies or representative institutions (such as Parliament), follow a *procedure* that is rational, fair and inclusive. In this sense deliberative democracy can be seen as a procedural form of democracy.⁴⁷ Deliberative democracy therefore tries to avoid questions of substance. Deliberative democrats accept that there will be disagreement on substantive issues as a result of the plurality of values, and consequently focus on reaching a rational consensus through the dialogical procedure of deliberation. In order for decisions to be legitimate there needs to be a discussion (deliberation) between informed participants on an equal platform.⁴⁸ Habermas argues, “political choice must be the outcome of deliberation about ends among free, equal and rational agents”.⁴⁹ This model is based on certain values such as rationality and impartiality.⁵⁰ It is an institutionalised model of democracy as it requires systems to be put in place for a platform to be created for participation.⁵¹

⁴⁵ For a full explanation of certain primary features of deliberative democracy see M Freeman “Deliberative Democracy: A Sympathetic Comment” (2000) 29 *Philosophy and Public Affairs* 371–418. See also Bishop (2009) *Constitutional Court Review* 321.

⁴⁶ See C Mouffe *The Democratic Paradox* (2005) 84. See also Roux “Democracy” in CLOSA10-16; J Habermas *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (trans W Rehg, 1996); J Rawls *Political Liberalism* (1993).

⁴⁷ Roux “Democracy” in CLOSA 10-17; Vitale (2006) *Philosophy & Social Criticism* 745-747.

⁴⁸ Bishop (2009) *Constitutional Court Review* 320 321.

⁴⁹ J Elster “Introduction” in J Elster (ed) *Deliberative Democracy* (1998) 1 5.

⁵⁰ Elster “Introduction” in *Deliberative Democracy* 1 5. See also Held *Models of democracy* 238-245.

⁵¹ Vitale (2006) *Philosophy & Social Criticism* 745.

A key element of deliberative democracy is its emphasis on a specific type of discourse and how this discourse should be communicated from the citizenry to the elected.⁵² This discourse is intended to create a mutual understanding (consensus)⁵³ and is characterised by listening.⁵⁴ Another significant component of deliberative democracy is public reasoning.⁵⁵ The people should be given the opportunity to reflect on political issues and the decisions and policies of their leaders.⁵⁶ Whereas participatory democracy emphasises the need to create participatory spaces, deliberative democracy focuses on the *type* of participation and the *nature* of the space. People should be given an opportunity to express their voice.⁵⁷ Deliberative democracy presupposes an elimination of power politics in order to create a space in which participants can engage on an equal footing and reach a rational consensus.⁵⁸

5 2 3 2 Deliberative democracy in South Africa

In addition to participatory democracy, the South African Constitution is also said to support a form of deliberative democracy.⁵⁹ Even though the term “deliberative democracy” is not used in the text of the Constitution, the Constitution contains various provisions which overlap with the ideal of deliberative democracy. For instance, it makes provision for public access to parliamentary forums, public participation in the

⁵² J Dryzek and P Dunleavy *Theories of the Democratic State* (2009) 219.

⁵³ See Vitale “Between participatory and deliberative democracy” (2006) *Philosophy & Social Criticism* 741-743; and J Flynn “Communicative Power in Habermas’s Theory of Democracy” (2004) 3 *EJPT* 433 436.

⁵⁴ Bishop (2009) *Constitutional Court Review* 323.

⁵⁵ See Freeman (2000) *Philosophy and Public Affairs* 371–411. See also J Cohen “Procedure and substance in deliberative democracy” in S Benhabib (ed) *Democracy and difference: Contesting the boundaries of the political* (1996) 67.

⁵⁶ C Van der Westhuizen “Democratising South Africa: towards a ‘conflictual consensus’” in H Botha, N Schaks & D Steiger (eds) *Das Ende des repräsentativen Staates? Demokratie am Scheideweg/The End of the Representative State? Democracy at the Crossroads* (2016) 75 80.

⁵⁷ 80.

⁵⁸ Vitale (2006) *Philosophy & Social Criticism* 758. Here Vitale discusses the need for equality in the economic and social spheres in order to ensure political equality. See further Freeman (2000) *Philosophy and Public Affairs* 392. See also the critique of deliberative democratic conceptions of impartiality in Held *Models of democracy* 238-245.

⁵⁹ *Democratic Alliance & another v Masondo NO & another* 2003 2 SA 413 (CC) para 42. See generally Freeman (2000) *Philosophy and Public Affairs* 371–418.

legislative process,⁶⁰ and the participation of minority parties in legislative committees.⁶¹ These provisions emphasise that the participation of diverse groups and interests is important in the parliamentary process. As the parliamentary process is fundamentally a space of deliberation and debate,⁶² ensuring the inclusion of the public and minority parties in these spaces strengthens the idea that deliberation should consider all voices.

The Constitution requires a democratic system to ensure “accountability, responsiveness and openness”.⁶³ This reinforces the idea of open communication between the people and the elected. It is also linked to the idea of reflection and debate among the electorate on social, economic and political matters, as a means of holding elected representatives accountable. Additionally, the Constitution requires a move from a “culture of authority ... to a culture of justification”.⁶⁴ This culture of justification requires all exercises of public power to be defensible and justified. In *Matatiele Municipality & Others v President of the Republic of South Africa & Others* (“*Matatiele*”),⁶⁵ Sachs J emphasised that, in order to achieve the goals of openness, accountability and responsiveness, the legislature must provide a *rational explanation* for legislative decisions.⁶⁶ On this view, South Africa’s democracy requires a specific

⁶⁰ Ss 59 (1), 72(1), 118 (1) of the Constitution.

⁶¹ Ss 57(2)(b), 116(2)(b) and 160(8). See *Democratic Alliance & another v Masondo NO & another* 2003 2 SA 413 (CC) para18 where Langa DCJ states:

“[s]ection 160(8) is couched in terms very similar to provisions concerning the national legislature (section 57(2)(b)) and the provincial legislatures (section 116(2)(b)). The purpose of these provisions is to ensure that minority parties can participate meaningfully in the deliberative processes of parliament, provincial legislatures and municipal councils respectively”.

⁶² On the deliberative nature of Parliament see *Swartbooi & Others v Brink* 2003 5 BCLR 502 (CC) para 20; *Dikoko v Mokhatla* 2007 1 BCLR 1 (CC) para 39. These cases deal with the importance of freedom of speech in relation to the privilege of members of the legislature to ensure open democratic debate and deliberation.

⁶³ S 1(d) of the Constitution.

⁶⁴ E Mureinik “A bridge to where? Introducing the Interim Bill of Rights” (1994) 10 *SAJHR* 31. This sentiment was also quoted in *Prinsloo v Van der Linde and Another* 1997 3 SA 1012 (CC) para 25.

⁶⁵ 2006 5 SA 47(CC).

⁶⁶ It is appropriate to quote Sachs J in *Matatiele* para 110:

“Far from the foundational values of the rule of law and of accountable government existing in discreet categories, they overlap and reinforce each other. Openness of government *promotes both the rationality* that the rule of law requires, and the *accountability* that multi-party democracy

type of communication between the elected and the electorate in order for the decisions of the elected to be legitimate.⁶⁷ Such communication has to be informed by openness.

In this context it is also important to refer to certain cases which affirm the deliberative nature of South Africa's democracy. In *Democratic Alliance & another v Masondo* ("Masondo")⁶⁸ Sachs J emphasised the importance of dialogue and deliberative democracy. For the decisions of State bodies to be legitimate, deliberative procedures must be in place which allow all interested parties to participate in discussions. In the view of Sachs J, the deliberative nature of our Constitution requires that all parties are heard, that there is meaningful deliberation and that all parties are given a dignified role in such deliberation.⁶⁹ This attaches importance to the "dialogic" role of deliberation which presupposes that meaningful debate must take place in democratic bodies (such as parliament and executive bodies).⁷⁰ Sachs J's sentiments were quoted and used in later cases to reinforce the idea that South Africa's Constitution envisages decision-making procedures that are deliberative in nature.⁷¹

Deliberative readings of South Africa's Constitution are supported by the idea that certain provisions in the Bill of Rights require that people should be given the opportunity to participate in decision-making processes that have a bearing on their rights and interests.⁷² From this perspective, the Bill of Rights is also a deliberative tool to establish a dialogical relationship between the people and the government, as

demands. In our constitutional order, *the legitimacy of laws* made by Parliament comes not from awe, but from *openness*" (emphasis added).

⁶⁷The sentiments expressed by Sachs J in *Matatiele* paras 99-110 indicate that openness and transparency promote rationality. In order for the public to measure the rationality of deliberation, it requires transparency from the government. Consequently, Sachs J emphasises rationality in deliberation, which is a key component in deliberative democracies.

⁶⁸ 2003 2 SA 413 (CC).

⁶⁹ *Democratic Alliance & another v Masondo NO & another* 2003 2 SA 413 (CC) para 42-43.

⁷⁰ Para 42-43.

⁷¹ *Oriani-Ambrosini, MP v Sisulu, MP, Speaker of the National Assembly* 2012 6 SA 588 (CC) paras 47-48; *Mazibuko v Sisulu* 2013 6 SA 249 (CC) para 44; and *Democratic Alliance v Speaker of the National Assembly* 2016 5 BCLR 577 (CC) paras 11-17.

⁷² S Liebenberg "Engaging the paradoxes of the universal and particular in human rights adjudication: the possibilities and pitfalls of 'meaningful engagement'" (2012) 12 *AHRLJ* 1 11-13.

well as between institutions and branches of government.⁷³ The Constitutional Court specifically used such a deliberative reading of the Constitution in its jurisprudence relating to eviction and its formulation of the requirement of “meaningful engagement”.

5.3.2.3 Deliberative democracy and meaningful engagement⁷⁴

The deliberative model of democracy has received concrete formulation in the Constitutional Court’s development of the adjudicatory strategy of meaningful engagement, originally developed within the ambit of section 26(3) of the Constitution and evictions cases.⁷⁵ Chenwi refers to meaningful engagement as a “mandatory consultation process between the parties ordered by the courts in the course of enforcing socio-economic rights”.⁷⁶ The court has established it as a requirement for reasonable State action in relation to socio-economic rights and as a remedial model.⁷⁷ The Constitutional Court first referred to the idea of meaningful participation — in relation to disputes regarding the content and ambit of socio economic rights — in the case of *Port Elizabeth Municipality v Various Occupiers* (“PE Municipality”).⁷⁸ This case dealt with evictions and housing rights, and the difficulty of providing solutions to such contentious disputes. The court stated:

⁷³ W le Roux “Descriptive overview of the South African Constitution and Constitutional Court” in O Vilhena, U Baxi and F Viljoen (eds) *Transformative constitutionalism: Comparing the apex courts of Brazil, India and South Africa* (2013) 135 145-146.

⁷⁴ Meaningful engagement is also described as being part of the participatory model of democracy. See Chenwi “Democratizing the Socio-Economic Rights-Enforcement Process” in *Social and Economic Rights* 184 where she states that “[m]eaningful engagement thus lies at the heart of democracy — it enhances the possibilities for deliberative, participatory democracy”. See also B Ray “Proceduralisation’s Triumph and Engagement’s Promise in Socio-economic Rights Litigation” (2011) 27 *SAJHR* 107 109, 114.

⁷⁵ Liebenberg (2012) *AHRLJ* 13-28. See also S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 293-303 and 418-423.

⁷⁶ Chenwi “Democratizing the Socio-Economic Rights-Enforcement Process” in *Social and Economic Rights* 178 179.

⁷⁷ The first time the Constitutional Court used meaningful engagement in the remedial process was in *Occupiers of 51 Olivia Road v City of Johannesburg* 2008 3 SA 208 (CC). See also Chenwi “Democratizing the Socio-Economic Rights-Enforcement Process” in *Social and Economic Rights* 185-188.

⁷⁸ 2004 12 BCLR 1268 (CC).

“one potentially dignified and effective mode of achieving *sustainable reconciliations* of the different interests involved is to encourage and require the parties to engage with each other in a *pro-active and honest endeavour* to find mutually acceptable solutions. Wherever possible, respectful *face-to-face engagement* or *mediation* through a third party should replace *arms-length combat by intransigent opponents*.”⁷⁹

Additionally, *PE Municipality* emphasises that there is a need for “equality of voice for all concerned”.⁸⁰ Sachs J also highlighted that “procedural and substantive aspects of justice and equity cannot always be separated”.⁸¹ From this perspective, socio-economic rights necessitate the involvement of the holders of these rights. This reinforces the deliberative nature of South African democracy by ensuring that all people who are affected by decision-making are given a chance to give their input, and thus to participate in the process of giving concrete content to these rights.⁸²

The Constitutional Court elaborated on this idea in *Occupiers of 51 Olivia Road v City of Johannesburg* (“*Olivia Road*”),⁸³ by requiring the parties to the dispute to “engage with each other meaningfully... in an effort to resolve the differences and difficulties... in the light of the values of the Constitution, the constitutional and statutory duties of the municipality and the rights and duties of the citizens concerned”.⁸⁴ *Olivia Road* also concerned the constitutionality of evictions.⁸⁵ The Court characterised meaningful engagement as a “two-way process” in which all

⁷⁹ Para 39 (emphasis added).

⁸⁰ Para 30.

⁸¹ Para 41.

⁸² Liebenberg (2012) 12 *AHRLJ* 1 11. Liebenberg describes how various rights in the Bill of Rights contribute to people’s involvement in the process of giving content to these rights. She writes:

“Many of the rights in the South African Bill of Rights, ranging from freedom of association, freedom of expression, access to information and just administrative action, enable and facilitate people’s involvement in a range of decision-making processes which define and affect their rights. The Bill of Rights thus protects a set of substantive values and interests as well as people’s right to participate in fundamental decisions that affect these values and interests.”

⁸³ 2008 3 SA 208 (CC).

⁸⁴ *Occupiers of 51 Olivia Road v City of Johannesburg* 2008 3 SA 208 (CC) para 5.

⁸⁵ See para 1-22.

parties should “act reasonably and in good faith” and should not make “non-negotiable, unreasonable demands”.⁸⁶

Meaningful engagement therefore requires a specific type of deliberation between the State and those affected by State decisions. Although it dictates the creation of a dialogical relationship in which parties are equal, meaningful engagement still places considerable decision-making power in the hands of State institutions.⁸⁷

5 2 4 Protests as a form of deliberative democracy

Deliberative democracy envisages an inclusive process aimed at ensuring that all who are affected by decision-making are included in the deliberative spaces where decisions are made. Freedom of assembly has an important role to play in this vision, as it enhances the people’s ability to voice their opinions and to influence decision-making. It can also play an important part in the formation of public opinion and putting pressure on institutions which are not inclusive. However, freedom of assembly does not fit comfortably into the mould of deliberative democracy in all respects. This is so for a number of reasons. First, freedom of assembly includes protection for certain types of demonstrations and protests that do not sit easily with deliberative democrats’ understanding of rationality and reason. Secondly, proponents of deliberative democracy favour a type of democratic engagement that is characterised by sensibility, pragmatism and a willingness to listen to the other side. Again, there are many demonstrations and protests that do not fit this description. Thirdly, deliberative conceptions of democracy tend to focus on institutionalised spaces of participation. Fourthly, deliberative understandings of democracy suppress the conflictual power relations that are constitutive of many forms of assembly.

First, deliberative democrats favour forms of communication that are reasoned and rational.⁸⁸ The rationality of deliberations is grounded in the procedures or rules of

⁸⁶ *Occupiers of 51 Olivia Road v City of Johannesburg* 2008 3 SA 208 (CC) paras 14-20. See also G Muller “Conceptualising ‘Meaningful Engagement’ as a Deliberative Democratic Partnership” (2011) 22 *Stell LR* 742 755-756.

⁸⁷ This has been particularly the case in *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 454 (CC). See particularly paras 112-113, 244-247, 301-304, 378-85.

⁸⁸ I Young “Activist challenges to deliberative democracy” (2001) 29 *Political Theory* 670 675-676. Young describes how the actions of activists participating in protests may be unreasonable by a deliberative democrat’s standards. While protesters and activists engage in activities which are “not

engagement. These procedures favour verbal over non-verbal communication, and rational argument over other forms of expression. By dictating the measure of reason and rationality, these procedures sometimes exclude a large portion of the population who cannot or do not wish to partake in this so-called rational manner.⁸⁹ Understanding freedom of assembly through the lens of deliberative democracy may therefore be problematic for a number of reasons. These include: the importance of non-verbal means of communication to freedom of assembly; the fact that many assemblies and demonstrations are aimed precisely at disruption and destabilisation; and the fact that protests allow a form of communication where the people can dictate the method of communication.

Secondly, but closely related to the first point, deliberative democrats emphasise the importance of a certain type of engagement (or discourse ethics) that is characterised by a sensible and pragmatic attitude. Within the context of meaningful engagement, the court in *Olivia Road* emphasised that “the people” should “not content themselves with an intransigent attitude or nullify the engagement process by making non-negotiable, unreasonable demands”.⁹⁰ The court in *PE Municipality* also noted the need for “parties to relate to each other in pragmatic and *sensible* ways”.⁹¹ While these characterisations of democratic engagement within certain forums make sense from a deliberative point of view, there is a danger in extending this logic to demonstrations and protests. Processes like meaningful engagement arguably attempt to eliminate the power relations, emotions and frustrations which characterise the relationship between the parties. This is an important strategy within certain contexts. However, it seems misplaced to extend it to freedom of assembly, which provides a channel in which people can vent their frustrations in ways that do not necessarily conform to deliberative democrats’ understanding of what is sensible or reasonable. Viewing freedom of assembly through the lens of deliberative democracy considerably narrows the scope for protests that are aimed, wholly or in part, at the disruption or destabilisation of the status quo. It also underestimates the power of

deliberative, then, in the sense of engaging in orderly *reason* giving, most activist political engagements aim to *communicate* specific ideas to a *wide public*” (emphasis added).

⁸⁹ Mouffe *The Democratic Paradox* 45.

⁹⁰ *Occupiers of 51 Olivia Road v City of Johannesburg* 2008 3 SA 208 (CC) para 20.

⁹¹ *Port Elizabeth Municipality v Various Occupiers* 2004 12 BCLR 1268 (CC) para 43 (emphasis added).

protests, contentious struggles and spontaneous political action to contribute to the content given to rights outside these deliberative processes.⁹²

Thirdly, deliberative democracy, like participatory democracy, tends to favour institutional over extra-institutional spaces of participation. Therefore, similar criticisms to those noted in 5.2.2 apply. While deliberative spaces are inclusive, they are also mostly invited spaces where the rules of engagement are largely dictated by those with power (namely the representatives). Protests seek to challenge these spaces outside the norms of these institutions. For protesters, it is difficult to challenge the system in these spaces. These invited spaces of deliberation attempt to be inclusive, but an invited space does not allow for protesters to create and initiate new spaces outside these deliberative institutions.

Finally, deliberative democracy is sometimes criticised for failing to recognise the importance of power and antagonism.⁹³ That is because it aims to create a space within which parties, who are fully equal, can move towards mutual understanding and ultimately a rational consensus. The focus is on procedural standards, rather than substantive issues.⁹⁴ Deliberative democrats assume that, while there cannot necessarily be consensus on substantive issues in a pluralistic society, consensus on the procedures to be followed can ensure a deliberative space of rational discourse between equal parties. In their view, procedures that are neutral with regard to substantive issues can help to eliminate power relations from deliberative spaces. This raises questions over the capacity of deliberative conceptions of democracy to explain freedom of assembly. Deliberative democrats highlight rationality at the expense of the conflictual dissent and antagonism which are inherent in protest action.⁹⁵ Because it favours rational argument, it excludes communication in the form of demonstrations and assemblies which attempt to disrupt the norms of society which dictate what is irrational and rational. By trying to create platforms of equal participation through

⁹² See S Liebenberg & K Young "Adjudicating Social and Economic Rights: Can Democratic Experimentalism Help?" in GH Alviar, K Klare & LA Williams (eds) *Social and Economic Rights in Theory and Practice: Critical Inquiries* (2014) 237-249.

⁹³ Mouffe *The Democratic Paradox* 48, 49 and 100.

⁹⁴ Van der Westhuizen "Democratising South Africa" in *The End of the Representative State? Democracy at the Crossroads* 81.

⁹⁵ Mouffe *The Democratic Paradox* 21 and 48.

eliminating power relations, it ignores the realities of the inherent power relations and biases which are sometimes intrinsic in the norms which form the rules of engagement.

5 2 5 Beyond participation and deliberation

South African courts recognise the importance of freedom of assembly,⁹⁶ and emphasise that it enables people to express their opinions in an organised manner and show their dissent.⁹⁷ The courts' reasoning and decision making are nevertheless often characterised by a cautious approach. The caution adopted by the courts is understandable, given the destabilising effects that dissent and protest action can have. However, this approach creates a limitation of the right even prior to exercise of the right.⁹⁸ It also indicates that courts are inclined to limit this right without having to delve into the realities and meaning of protest and dissent and how this relates to democratic participation.

The *Brokdorf* case refers to freedom of assembly as an "early political warning sign".⁹⁹ As an early warning sign it influences government to prevent even greater discontent and the breakdown of the representative model.¹⁰⁰ The failure of government to respond and create a dialogue with "the people" highlights the need that the public feels for another means of dialogue (namely protest), and may also indicate the failure of the representative and participatory models, particularly at the level of local government.¹⁰¹ This failure is partly demonstrated by the increase and regularity of service delivery protests.¹⁰² On the surface these protests are aimed specifically at service delivery issues, but they also speak to a deeper problem. In the

⁹⁶ *South African Transport and Allied Workers Union v Garvas* 2013 1 SA 83 (CC) para 61.

⁹⁷ *South African National Defence Union v Minister of Defence* 1999 4 SA 469 (CC) para 8.

⁹⁸ See 3 2 1.

⁹⁹ BVerfGE 69, 315, 347.

¹⁰⁰ BVerfGE 69, 315, 347.

¹⁰¹ Mbazira "Service delivery protests" (2013) *SAJHR* 251-275, 252, 264 and 265.

¹⁰² MC Dawson "Resistance and Repression: policing protest in post-apartheid South Africa" in J Handmaker & R Berkhout (eds) *Mobilising Social Justice in South Africa: Perspectives from Researchers and Practitioners* (2010) 109-113.

view of some commentators, they are evidence of discontent with and distrust of the very representative institutions which, for many, symbolise democracy.¹⁰³

Attempts to understand protests in participatory and deliberative terms, are reliant on the very institutions which protests seem to oppose. Certain types of deliberation and participation through protest action can be understood in terms of these models. For these types of protests there needs to be some sort of *trust* in the ability of those institutional forms of democracy to represent their interests. However, there are protest actions which seem to indicate a fundamental distrust of institutional spaces of participation. Furthermore, understanding protests in these spaces underestimate their disruptive potential which can be vital for democracy.¹⁰⁴ It does not follow from the institutionalisation of spaces of participation that there cannot be extra-institutional spaces for the people to exert their power.¹⁰⁵ Protests are potentially conflictual, disruptive and disorderly. But that is what makes them powerful. The people's power, which can sometimes take the form of insurrectional power, plays an important role in challenging the law and transforming society by creating new spaces for those who are powerless in institutionalised and "fixed"/stable spaces of democracy.¹⁰⁶ Through conflict and disruption, protests recognise the problems within society and challenge the status quo (which is sometimes protected and reinforced by participatory spaces).¹⁰⁷ Protests do not necessarily undermine the institutions of representative democracy. However, by challenging these institutions *outside* the normal institutional participatory and deliberative spaces, protests have the ability to create new spaces of democratic contestation and transform existing ones. Protests can then act as an

¹⁰³ Dawson "Resistance and Repression" in *Mobilising Social Justice in South Africa* 113-119 and 128. The examples provided by Dawson show that the level of discontent is directed at the *representatives* of local government and not necessarily democracy itself.

¹⁰⁴ J Brown *South Africa's Insurgent Citizens* (2015) 19-25. Brown provides an analysis of the power of protests to disrupt. The very power of protest, as opposed to other forms of political expression, is its power of a "disruption of the sensible".

¹⁰⁵ Botha (2017) *Law, Democracy and Development* 2213-4.

¹⁰⁶ É Balibar *Equaliberty: political essays* (2014) 18, 31-33 and 37. Balibar emphasises the power of insurrection as an important part of creating new spaces. Social movements use this power to create new spaces of contestation and to transform existing ones in order to "win rights that do not yet exist or expand those that do".

¹⁰⁷ Young (2001) *Political Theory* 670 679.

“early political warning sign” by pressuring the normal spaces of deliberation and participation and thereby strengthening them.

By understanding protests in terms of participatory and deliberative processes, and by attempting to minimise or eliminate the conflict involved, we risk diminishing the very power and potential of protest action. At the same time, it is problematic to understand protests simply as undermining or extinguishing representative democratic institutions. Although protest movements work outside institutions, it is not always helpful to understand protests as a form of democracy which challenges the very legitimacy of the state and representative institutions.¹⁰⁸ What is needed is a better understanding of the capacity of protest action both to engage with and enrich the institutions of representative democracy, and to provide spaces of disruption, contestation and antagonism.

While deliberative and participatory democracy can explain certain protest actions, it is not possible to understand disruptive protests in terms of these models. The idea of agonistic democracy, as developed by Chantal Mouffe, may be more useful in this respect.

5 3 Agonistic democracy

5 3 1 *Agonistic pluralism and an adversarial model of democracy*

Mouffe develops a model of democracy from a critique of deliberative democracy and its shortcomings. As stated above, deliberative democracy seeks to establish a “rational consensus”. Deliberative democrats accept the inevitability of substantive disagreement in modern societies because of a pluralism of values, but emphasise that these disagreements do not have to affect the possibility of a rational consensus in the public or political sphere.¹⁰⁹ By shifting these questions — which may result in substantive disagreement — to outside the deliberative space in order to establish such a rational consensus, a type of deliberative democracy emerges which limits

¹⁰⁸ S Newman “Occupy and Autonomous Political Life” in A Kioupkiolis & G Katsambekis (eds) *Radical Democracy and Collective Movements Today* (2014) 93 100-101.

¹⁰⁹ Rawls attempts to shift these questions of disagreement (on controversial issues) to the private sphere of life. See Mouffe *The Democratic Paradox* 28-29; C Mouffe *The Return of the Political* (1993) 50-51. Habermas shifts disagreements over different conceptions of the “good life”, which are the domain of ethics, from this space of an ideal discourse. According to Mouffe, he thus attempts to eliminate the very idea of the political which is constitutive of power relations and tensions.

antagonism by reducing spaces of contestation. As Mouffe states, “[p]rovided that the procedures of the deliberation secure impartiality, equality, openness and lack of coercion, they will guide the deliberation towards generalizable interests which can be agreed by all participants, thereby producing legitimate outcomes”.¹¹⁰ Therefore the legitimacy of decisions is ensured through the procedure of participation and deliberation. However, Mouffe argues that this type of rational consensus is an impossibility, because procedures already have predetermined ethical commitments.¹¹¹ Furthermore, in order to establish this “ideal discourse” within the deliberative model there needs to be an elimination of power and contestation.¹¹² Mouffe contends that it is impossible to extinguish antagonism and relations of power in a democratic society. Mouffe states:

“...according to the deliberative approach, the more democratic a society is, the less power would be constitutive of social relations. But if we accept that relations of power are constitutive of the social, then the main question for democratic politics is not how to eliminate power but how to constitute forms of power more compatible with democratic values”.¹¹³

For Mouffe, democratic politics must validate and recognise the inherent conflict and aim to create what she refers to as “agonistic pluralism”. Politics and political spaces are constructed by distinguishing between “us” and “them”.¹¹⁴ In various spaces of contestation and antagonism, the “them” is construed as an enemy.

¹¹⁰ Mouffe *The Democratic Paradox* 89 and 48.

¹¹¹ Mouffe *The Democratic Paradox* 68 and 97. As Mouffe puts it, “...a strict separation between ‘procedural’ and ‘substantial’ or between ‘moral’ and ‘ethical’, separations which are central to the Habermasian approach, cannot be maintained. Procedures always involve substantial ethical commitments, and there can never be such a thing as purely neutral procedures”.

¹¹² S Benhabib “Toward a Deliberative Model of Democratic Legitimacy” in S Benhabib (ed) *Democracy and Difference* (1996) 68. As stated by Benhabib, “legitimacy in complex democratic societies must be thought to result from the free and unconstrained public deliberation of all on matters of common concern”. “Free and unconstrained” and impartiality emphasise that relations of power need to be eliminated in order to establish equality and lack of coercion.

¹¹³ Mouffe *The Democratic Paradox* 100.

¹¹⁴ Mouffe *The Democratic Paradox* 101. It is important to note how Mouffe defines “politics” and the “political”. For Mouffe the political is “the dimension of antagonism which is inherent in human relations”. Mouffe defines politics as indicating “the ensemble of practices, discourses and institutions which seek to establish a certain order and organize human coexistence in conditions that are always potentially conflictual because they are affected by the dimension of ‘the political’”.

Agonistic pluralism should aim to transform the enemies “to be destroyed” into *adversaries*.¹¹⁵ Mouffe thus distinguishes between *antagonism* and *agonism*. While *antagonism* refers to a struggle between enemies, *agonism* is the struggle between adversaries.¹¹⁶ An adversary is acknowledged as a legitimate enemy.¹¹⁷

Mouffe accepts that there must be a consensus on specific values which underpin a democratic society, but this must be a “conflictual consensus”.¹¹⁸ This conflict should be played on the terrain of different conceptions of citizenship. There should be confrontations between diverse interpretations of the values underpinning the democratic society, which give rise to these spaces of contestations and clashes of adversaries.¹¹⁹ Key to this model of democracy is that it places the very spaces of contestation and antagonism at its centre. For Mouffe, the key proposition of agonistic pluralism is that “far from jeopardising democracy, agonistic confrontation is in fact its very condition of existence”.¹²⁰

5 3 2 *From the sensible and rational to a ‘conflictual consensus’ in South Africa*

In the deliberative conception of democracy, forms of democratic participation which do not fit the mould of the sensible and reasonable are not considered legitimate.

Deliberative democrats are of the view that once a consensus is established which is reasonable and rational, there cannot be a challenge to this legitimate space. Any challenge to this consensus would be from persons who are irrational and unreasonable.¹²¹ In legislative bodies, which are deliberative forums, a specific type of dialogue is expected. The problem is that the procedural means of interaction and dialogue that are relied on in an attempt to eliminate power, are in themselves constitutive of power. As shown by Mouffe:

¹¹⁵ Mouffe *The Democratic Paradox* 101-103.

¹¹⁶ 101-103.

¹¹⁷ An adversary is “somebody whose ideas we combat but whose right to defend those ideas we do not put into question”. Mouffe *The Democratic Paradox* 102.

¹¹⁸ 103.

¹¹⁹ 103-104.

¹²⁰ 103.

¹²¹ Mouffe *The Return of the Political* 28-29 and 24-25.

“...who decides what is reasonable and what is not reasonable? In politics the very distinction between ‘reasonable’ and ‘unreasonable’ is already the drawing of a frontier; it has a political character and is always the expression of a given hegemony.”¹²²

As demonstrated by Christi Van der Westhuizen, deliberative democratic understandings in South Africa are exclusionary. Van der Westhuizen uses the activist politics employed by the Economic Freedom Fighters (“EFF”) to show how parliamentary institutions, as deliberative forums, result in an exclusion of certain voices. The EFF’s parliamentary activism is a form of radical democratic contestation which brings about Mouffe’s “conflictual consensus”.¹²³ Van der Westhuizen describes the activism of the EFF as bringing “a previously excluded voice that is socio-politically marginalised into the parliamentary discourse”.¹²⁴ While the EFF uses non-conventional modes of participation in these forums, the African National Congress (“ANC”) uses the concepts of rational deliberation and reasonableness to legitimise the exclusion and suppression of dissenting voices.¹²⁵ They exclude these voices by insisting that the manner of participation has to be in accordance with what they regard as reasonable and rational. Van der Westhuizen also demonstrates how ideological enemies, like the Democratic Alliance (“DA”) and the EFF have collaborated to challenge the majority party.¹²⁶ This shift highlights how parties with competing ideologies can transform into adversaries in agonistic pluralistic understandings of democracy. Understanding South Africa’s democracy as shifting to a new paradigm where enemies are transformed into adversaries also allows for different types of contestation and activist politics within traditional deliberative settings.

Similarly, the deliberative adjudicatory model of meaningful engagement highlights a dialogue which allows parties to engage in sensible ways and not be “unreasonable”. This normally results in the State determining what qualifies as reasonable and

¹²² 148.

¹²³ Botha (2017) *Law, Democracy and Development* 221; Van der Westhuizen “Democratising South Africa” in *The End of the Representative State? Democracy at the Crossroads* 75 95-101.

¹²⁴ Van der Westhuizen “Democratising South Africa” in *The End of the Representative State? Democracy at the Crossroads* 100.

¹²⁵ 98.

¹²⁶ 97-100.

sensible,¹²⁷ and participation outside the sensible is deemed illegitimate. Meaningful engagement has been advanced as a form of democratic experimentalism.¹²⁸ Democratic experimentalism has been described as a “new paradigm of institutional thinking about democracy and law”.¹²⁹ It is an inclusive approach which seeks to include various parties in rethinking the implementation and content of rights. It specifically seeks to establish a more pragmatic, deliberative approach to bring state institutions and various other stakeholders together in order to coordinate and negotiate solutions to diverse solutions.¹³⁰ It also specifically highlights the adjudicatory role of the courts in this inclusive process. A critique of democratic experimentalism — and consequently meaningful engagement — is that it minimises the role of contentious political and cultural processes through which rights can acquire meaning. As stated by Liebenberg and Young, “democratic experimentalism seems to ignore the potential contributions of spontaneous, not fully deliberative and possibly confrontational political action and expression”.¹³¹ This reveals how a deliberative conception such as experimentalism also possibly excludes voices that participate in confrontational and contentious ways. It is possible however in a conflictual consensus, to allow these contentious forms of participation into democratic institutions and remedial strategies.

5 3 3 Protests in an adversarial model of democracy

The restrictive and marginal position of freedom of assembly within South Africa’s constitutional discourse¹³² can be attributed to the emphasis on a deliberative, participatory reading of the Constitution within an established model of representative

¹²⁷ Given the State’s decision making power, it has a large degree of power in these deliberative spaces. See footnote 97 above.

¹²⁸ Liebenberg & Young “Adjudicating Social and Economic Rights” in *Social and Economic Rights in Theory and Practice: Critical Inquiries* 243.

¹²⁹ 237.

¹³⁰ 239. Democratic experimentalism is not confined to remedial strategies but is labelled as “an entirely new architecture for governing”.

¹³¹ 249.

¹³² As discussed in chapter 3.

democracy.¹³³ This institutional and procedural focus of participation and deliberation has shifted the 'politics of the street' — in the form of disruptive protests — to the periphery of constitutional thought. As highlighted above, these conceptions focus on processes which privilege ideal discourse and rational deliberation above the contentious and conflictual.

As indicated in chapter two, protests can be violent, destabilising and spaces of antagonism. Agonistic democracy may remedy the shortcomings of deliberative and participatory conceptions of democracy within South Africa which exclude these important voices of activism in protests. The emphasis should not be on replacing the deliberative and participatory conceptions, but to allow for an agonistic theory to inform ideas on protests which are better served to understand power, conflict and disruption. The agnostic model may re-establish the centrality of protests to democratic politics. This is because agonistic pluralism places conflict and power as its focal point.

Deliberative and participatory institutions regard an established consensus on specific liberal ideals as necessary before participation can occur in an ideal manner. By contrast, agonistic pluralism seeks to create spaces of contestation in which the rules of participation and the content of those political ideals can be challenged. It allows protesters to contest the meaning and content of rights. It acknowledges that these political ideals are indeterminate and indefinite. Protests, within agnostic pluralism, constantly seek to contest the meaning of the reasonable and rational by bringing new challenges to political ideals such as equality, freedom and dignity.

Protests typically stand outside the spaces of institutional participation. Agnostic pluralism assists in understanding the disruptive potential of protest action in disrupting existing power relations. As pointed out by Mouffe, interaction in democracies between various parties in existing institutions and through established practices articulates its own hegemony. The identities and positions of these parties in this democratic interaction are shaped by these dominant relations of power.¹³⁴ Agonistic pluralism recognises these power relations. Rather than attempting to eliminate these power relations prior to interaction, it recognises that deliberative and participatory institutions

¹³³ The mention of freedom of assembly as a form of direct democracy has further moved academic writings on freedom of assembly to the periphery of constitutional thought. Therefore, this adds to the marginal and restrictive role it plays in modern representative democracy. See chapter 4 part 4 3.

¹³⁴ Mouffe *The Democratic Paradox* 99-100.

are constitutive of these relations. This allows for forms of participation which challenge the norms of existing powers.

In an adversarial model of democracy, there is a transformation from enemies to adversaries. This allows the state to view protesters as adversaries rather than enemies to be destroyed (as in Marikana) or as irrational or unreasonable. Rather than excluding these voices as irrational, unreasonable, criminal or unlawful, this adversarial mode allows the State to disagree with protesters, yet to see their disruptive demonstrations as legitimate in a democracy which seeks to be inclusive. The shift from enemy to adversary may assist in allowing the relationship to be characterised not by violence and the silencing of voices, but by forms of contestation and antagonism which recognise the worth of disruptive participation. Such a shift on the part of the State will allow protesters to change their conception of the State as an enemy to be destroyed, and to see it rather as a legitimate holder of public power and simultaneously as an adversary who they vehemently disagree with.¹³⁵ This also explains the manner in which protesters direct their grievances towards the government and other institutions holding power. Protesters view these representative — deliberative and participatory — institutions as legitimate, however the innate lack of trust of these institutions by protesters indicate an inherent conflict between the people and their representatives.

The potential of activist politics in parliament is also indicative of the potential of agonistic pluralism with regard to protest action. In Van der Westhuizen's analysis of the democratic politics of the EFF, she also points out that the EFF "with its activism, multiplies the discourses that form democratic citizens".¹³⁶ This is similar to ideas mentioned above of protest playing an important role in challenging the law and

¹³⁵ This is an important consideration. There are certain radical movements which seem to undermine the very legitimacy of the government/democratic system. These movements do not necessarily accept the legitimacy of the public power. The Marikana protests, as discussed in 2.4.4.3 are an example of these. The reason certain protests — such as the Marikana protests — at times worked outside the system is because within that specific deliberative and participatory paradigm there was no space for contestation. Mouffe's agonistic democracy would be informative in this regard as it provides a space for this type of contestation. While in deliberative and participatory systems, animosity or friction are seen as illegitimate forms of participation, agonistic democracy requires all role players (such as the State and trade unions in Marikana), to view each other as legitimate opponents, rather than enemies.

¹³⁶ Van der Westhuizen "Democratising South Africa" in *The End of the Representative State? Democracy at the Crossroads* 100.

transforming society by creating new spaces for those who are powerless in institutionalised and “fixed”/stable spaces of democracy.¹³⁷ Protests, in an agonistic model, can be viewed as constantly changing the idea of what it means to be a democratic citizen, and as giving power to those who are disadvantaged or socially and economically disenfranchised. On this understanding, protests challenge deliberative and participatory institutions to constantly rethink who is excluded from their processes. This thought process could allow these established spaces to become more inclusive.

5 4 Conclusion

This chapter investigated the possibility of including protest action within the models of participatory and deliberative democracy. It did so by providing a brief exposition of each model’s characteristics and indicating how these models are evident within South Africa’s democracy, with reference to case law and legislation. The chapter argued that these conceptions are unable to adequately address and explain protest actions which are characteristically disruptive, conflictual and contentious (as established in chapter two). Although participatory and deliberative democracy are important democratic models in South African, the emphasis on these conceptions possibly contribute to the marginal and restrictive role of freedom of assembly within the legislative and constitutional framework (as indicated in chapter three). This chapter showed how a model of agonistic pluralism may assist in reinforcing the importance of protest action with South Africa. The distinguishing characteristic of this model is that it places conflict at its centre, rather than attempting to limit or eliminate such antagonism. The nature of the dissent and conflict inherent in the protests in South Africa, as elaborated in chapter two, is more easily explained by such a model. If this model is used to explain and inform our ideas about protest action, it will allow for a more inclusive idea of democracy in South Africa which once again places dissent through protest as central to our democracy.

¹³⁷ See footnote 117 above.

Chapter 6

6 Conclusion

The main aim of this thesis was to determine whether and to what extent different understandings of democracy in South Africa allow us to make sense of the nature and importance of the right to freedom of assembly. This chapter will draw on the conclusions drawn in the previous chapters, and attempt to link them together.

6 1 South Africa: the protest capital of the world

Chapter two of this study examined the right to assemble from an historical perspective. This historical analysis focused both on the history of the regulation of assemblies and demonstrations in South Africa, and on the historical importance of protest action as a mechanism through which the dispossessed and marginalised can challenge their exclusion. This can help to shed light both on official attitudes relating to freedom of assembly, and on the continued importance and prevalence of protests in post-apartheid South Africa. The second point is stated powerfully by Mogoeng CJ:

“So the lessons of our history, which inform the right to peaceful assembly and demonstration in the Constitution... tell us something about the inherent power and value of freedom of assembly and demonstration, as a tool of democracy often used by people who do not necessarily have other means of making their democratic rights count.”¹

Protests not only played a vital role as a tool of resistance against the injustices of apartheid, but continue to be central to democratic participation in post-apartheid South Africa. Chapter two analysed the increase in protest action in South Africa and highlighted some of its causes. It found that so-called service delivery protests are used to challenge both socio-economic disparities and failures on the part of the state to facilitate democratic participation. Although these protests are typically directed at local government, they highlight issues that transcend the confines of local communities. Protests are also used in labour disputes. Here, the boundaries sometimes become fuzzy, as some labour disputes also involve challenges to state

¹ *South African Transport and Allied Workers Union v Garvas* 2013 1 SA 83 (CC) para 63.

institutions and trade unions. Moreover, protests are part of the varied repertoire used by political parties to challenge one another and gain support.²

Protests are an essential part of day to day democracy in South Africa. They are used by a diversity of social actors to challenge the status quo, and are volatile, antagonistic and conflictual spaces often characterised by violence.³

6 2 Section 17 of the Constitution and the Regulation of Gatherings Act

Chapter three examined the nature and scope of section 17 of the Constitution. It argued that this section, read through the lens of the democratic values of freedom, equality and dignity, should be an important vehicle for democratic participation and contestation.⁴ Chapter three also investigated the Regulation of Gatherings Act (“RGA”) and the problematic implementation of this piece of legislation which partly contributes to the unrealised potential of freedom of assembly in South Africa. The chapter focussed on the notice requirements, in section 3 of the RGA, which are particularly burdensome on the organisers of protest action. The notice requirements also provide a wide discretion to the local municipality in controlling these spaces by preventing the organisers from continuing under the wide umbrella of preventing potential harm. Moreover, the powers of police to control these gatherings and possibly target participants and organisers, as discussed in chapter three, are constitutionally suspect. Some of the more problematic elements are the criminal sanctions in section 12 of the RGA which are detrimental to the exercise of the right. In this regard, chapter three analysed the recent High Court case of *S v Mlungwana* (“*Mlungwana*”).⁵

Mlungwana concerned a challenge to the constitutionality of section 12(1)(a) of the RGA. This section provides for a criminal sanction for a convenor of a gathering who has failed to fulfil the section 3 notice requirement. Even though the High Court’s judgment is encouraging, the arguments advanced on behalf of the State in this case demonstrate the State’s restrictive views towards protests. On the State’s view, criminalisation is a necessary deterrent to ensure compliance with the notification

² See chapter 2 part 2 4 4 4.

³ See chapter 2 part 2 4 4 2.

⁴ See chapter 3 part 3 1 2.

⁵ *S v Mlungwana and Others* 2018 1 SACR 538 (WCC).

requirements. The State sees protests and protest organisers in a negative light, and is more concerned with the capacity of local authorities and the police to control protests, than with the capacity of the people to exercise their democratic right of freedom of assembly.

Additionally, the chapter analysed and critiqued the various judgments in the litigation involving *South African Transport and Allied Workers Union v Garvas* (“SATAWU”).⁶ It was shown that the courts, beyond their rhetoric about the centrality and importance of freedom of assembly to democracy, have given a restrictive interpretation to freedom of assembly. The finding that section 11 of the Regulation of Gatherings Act, which imposes a stringent form of liability on the organisers of gatherings, is constitutional, has a potentially chilling effect on protest action. The *SATAWU* court emphasised that the RGA is “deliberately tight” because protests call for “extraordinary measures to curb potential harm”.⁷ The judiciary recognises that protests are, by nature, places of potential discord and contention. However, it appears to view such contestation and disruption as something to be contained as far as possible, rather than as something that can contribute to democracy. It therefore considers the antagonism that is inherent in many protests as irrational and unreasonable, and thus outside of the bounds of an open and democratic society.

6 3 Direct and representative democracy

Chapter four asked whether and to what extent representative and direct models of democracy can shed light on the nature, content and importance of freedom of assembly. It examined the political theory underlying representative and direct democracy, and sought to relate their specific characteristics to South Africa’s democracy.

It was argued that the assumption made by a number of academics that freedom of assembly is a form of direct democracy is problematic. This is so particularly because exercises of this right do not amount to decision making. Protests involve democratic contestation, but the decision ultimately rests with representatives.⁸ At the same time, however, the chapter established that a restrictive understanding of representative

⁶ 2013 1 SA 83 (CC).

⁷ *South African Transport and Allied Workers Union v Garvas* 2013 1 SA 83 (CC) para 38.

⁸ See chapter 4 part 4 3 2.

democracy contributes to an impoverished and constrained understanding of the role of protest action within a democracy. This restrictive understanding assumes that the will of the people is identical to the decisions of representatives, and minimises the role of participation beyond and between elections.⁹ This conception of democracy places freedom of assembly at the periphery of democracy, and may result in a restrictive interpretation of freedom of assembly as indicated in chapter three and the analysis of *SATAWU*.

6 4 From participation and deliberation to an agonistic form of democracy

Chapter five investigated the possibility of viewing freedom of assembly through the lens of participatory and deliberative democracy.¹⁰ It examined the characteristics of these models of democracy and determined that both operate within an existing representative democracy and are reliant on an established institutional framework for participation and deliberation. This chapter found that certain types of protest action can adequately fit within the model of participatory democracy. It is also accepted by the judiciary that protests form part of the participatory model of democracy.¹¹ However, participatory democracy relies on representatives to initiate spaces for participation. By contrast, protests presuppose the ability of the people to create their own spaces of participation. Moreover, protests which are antagonistic and contentious do not fit within the participatory paradigm, as it allows representatives to exclude and control spaces of participation which inevitably may lead to taking the potential power of protests away.

Deliberative conceptions of democracy similarly stress the value of participation, and are subject to the same criticisms as those levelled against participatory democracy. Furthermore, in the deliberative conception of democracy, emphasis is placed on the manner of participation, which should be rational and reasonable. This study argued that the deliberative model is unable to account for the inherent antagonisms and conflict which are inherent in protest action. Participatory and

⁹ See chapter 4 part 4 4 2.

¹⁰ See chapter 5 part 5 2 for a discussion on the difference between deliberative and participatory conceptions of democracy.

¹¹ See chapter 5 part 5 5 2.

deliberative models of democracy attempt to eliminate tensions and conflict by creating a platform for a possible rational consensus.

Protest action provides people with “an outlet for their frustrations”.¹² Deliberative and participatory models of democracy are largely unable to make sense of this function, which inevitably results in a clash of positions. As stated by Mouffe, “[a] well-functioning democracy calls for a vibrant clash of political positions”.¹³ This study argued for a model of agonistic pluralism as advocated by Mouffe. Rather than attempting to eliminate and exclude conflict from democratic thought, agonistic pluralism recognises that these conflicts are not only impossible to eliminate, but are fundamental to democracy. This model will more suitably allow for an understanding of protest action which reinforces the potential power of protest action in South Africa. While the judiciary accepts that protests are by their nature conflictual and disruptive, their understanding of democracy makes them view this as detrimental to an open and democratic society. As argued by this study, agonistic pluralism will not attempt to eliminate the frustrations and passions evident in protests but attempt to reconceptualise them within the already existing representative framework.

6 5 Concluding remarks

This study asked whether and to what extent different models of democracy enable an adequate understanding of the nature, meaning and importance of the fundamental democratic right to freedom of assembly in South Africa. Section 17, like all other provisions in the Bill of Rights, must be interpreted in view of the values that underlie an open and democratic society based on human dignity, equality and freedom.¹⁴ Protest action is fundamental in our democracy. As stated by Mogoeng CJ: “Indeed, it is one of the principal means by which ordinary people can meaningfully contribute to the constitutional objective of advancing human rights and freedoms”.¹⁵ Section 17 allows people to participate and *contribute* to their idea of what an open and democratic society should be. Different conceptions of democracy either tend to minimise the role of these contributions or shift these contributions to the outside of

¹² *South African Transport and Allied Workers Union v Garvas* 2013 1 SA 83 (CC) para 61.

¹³ C Mouffe *The Democratic Paradox* (2005) 105.

¹⁴ S 39(1) of the Constitution.

¹⁵ *South African Transport and Allied Workers Union v Garvas* 2013 1 SA 83 (CC) para 61.

what is considered legitimate in a democracy. This is done by dictating how, when and who can and should participate in democracy. This stifles the potential of a more progressive inclusive vision of a democratic society where different voices are given the power to create and contribute to the society within which they live. Even more so in South Africa, where the marginalised voices need an avenue which is not stifled by the red tape and authoritative control exercised by the State. The exercise of political will through protests outside the bounds of State control is not necessarily the exercise of political power outside the bounds of a democracy. Our constitutional democracy is one where “We, the people” is not an empty slogan. “We, the people” is evidenced in the lively and boisterous protests. What is clear is that freedom of assembly must be interpreted and understood in the context of a democratic culture where social dissent is seen as a social good rather than as illegitimate.

South Africa is a country defined by the right of all to participate and challenge authority in order to create a more inclusive society, informed by the values of freedom and equality. Section 17 allows people to participate and create a space which unequivocally says that they matter. Allowing people to participate in such a conflictual manner will allow us to “[b]elieve that South Africa belongs to all who live in it”.¹⁶

¹⁶ The preamble to the Constitution.

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